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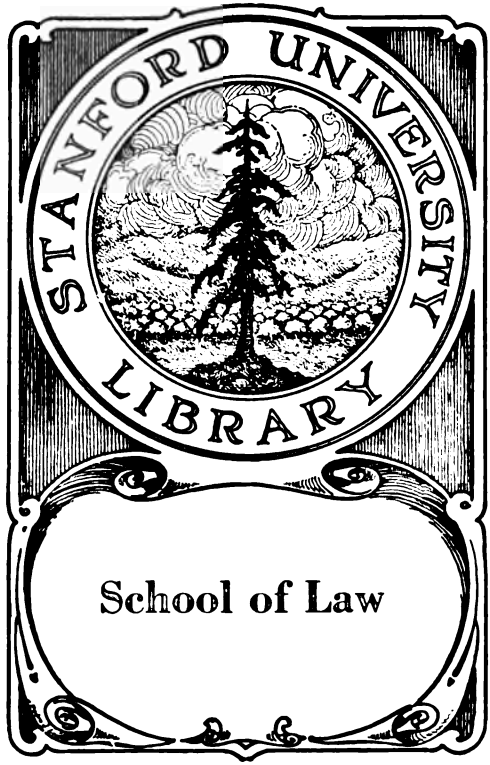
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CONTEMPT OF COURT BY DEBTORS.

SOME of the difficulties experienced by practitioners in New Brunswick in relation to proceedings taken under the Act for the arrest, imprisonment, and examination of debtors, C. S. N. B. 1903 c. 130, are due not so much to ambiguity or to want of clearness in the language of the Act, as to the absence of minute and explicit directions in respect to matters of procedure, and the anxiety and tendency of practitioners to adjust the practice to common law rules of practice. In no respect is the disposition to resort to common law analogies more strikingly illustrated than in the practice that has been followed with respect to attachment and committal under the Act.

Section 36 of c. 130, C. S. N. B. 1903, providing for the examination of a judgment debtor or person ordered to pay money under the order of a Court, before a Judge of any County Court, or clerk of the peace, as to any and what property he has which by law is liable to be taken in execution on such judgment or order, etc., enacts that the disobedience of an order to attend the examination, "after service of a copy thereof on him, or a refusal to answer all proper questions on such examination, shall be punishable by attachment for contempt, which attachment may issue out of the County Court on the order of a Judge thereof, on affidavit of the facts." The failure to make provision for numerous formalities to be observed in attachment proceedings is taken advantage of to overlook the plain word-

ing of the section, and to seek to assimilate the practice as to attachment under the section to the rules regulating attachment at common law.

At common law it is held not to be a contempt to disobey a Judge's order, on the ground that a court of record alone has power to fine or imprison for contempt, and a Judge sitting at Chambers is not a court of record: Rex v. Faulkner, 2 C. M. & R. 525; Fall v. Fall, 2 Dowl. 88; Ashmore v. Rypley, 2 Sc. N. R. 203. But, as the Judge sitting at Chambers is exercising powers delegated to him by the Court, the Court can adopt his order by making it a rule of Court, whereupon a writ of attachment can be issued: Chilton v. Ellis, 2 Dowl. 338; Baker v. Rye, 1 Dowl. 689; Hinchliffe v. Jones, 4 Dowl. 86; Rex v. Wilkes, 4 Burr. 2569; Curtis v. Bligh, 9 Jur. 1151; Ex p. Laurence, 2 Dowl. 230. The order can be made a rule of Court by rule nisi, or by a rule absolute in the first instance: see Wilson v. Northrop, 2 C. M. & R. 326. And one rule is sufficient for making the order a rule of Court and for an attachment thereon: Forster v. Kirkwall, 4 Dowl. 370. A Judge sitting at Chambers is also precluded from issuing a writ of attachment by the circumstances that at common law the writ can only be issued by the Court. In deference to these rules of practice, it is assumed and acted upon by practitioners that a contempt under the above s. 36 can only be punished by a writ of attachment, issued upon motion made before the Judge of a County Court in open Court.

While it is not a contempt to disobey a Judge's order, the rule is limited to where the order is made by a Judge as the delegate of the Court, the substitute and not the principal, as in amending an issue: Baker v. Rye, 1 Dowl. 689; or in putting off a trial: Plumb v. Miller, 5 O. S. 484; and has no application where a Judge is invested with power to enforce his order: see Watson v. Bennett, 5 H. & N. 831; Kemp v. Neville, 10 C. B. N. S. 523. The position of a County Court Judge sitting at Chambers is in no wise analogous to that of a Judge of a Superior Court sitting at

Chambers and exercising a delegated function. The County Court Judge at Chambers is manifestly not acting as the delegate of himself as Judge of the County Court in term. To require that his order made at Chambers should be made by him a rule of Court, before its disobedience can be visited with punishment, as in Jones v. Monroe, 33 C. L. J. 578, is to insist upon a course of practice wholly destitute of good sense, and adopted in submission to a scheme of procedure adapted to different circumstances and based on different considerations. The Judge of a County Court is pursuing a statutory power. Its terms can alone be examined to determine the manner the power shall be exercised, if they in themselves lay down the procedure to be followed. The provision of the Act that the "attachment may issue out of the County Court on the order of a Judge thereof," is about as explicit a direction as can be given that the writ of attachment may be issued on an order made at Chambers. Nor does there seem to be any reason for questioning that he possesses this power in relation to contempt arising upon proceedings taken under the section before a clerk of the peace or commissioner. The Act specifies that disobedience to an order under the section, or a refusal to answer all proper questions on the examination, shall be punishable as contempt. When the contempt takes place, no other condition upon which jurisdiction is made to depend has to be fulfilled. If it were necessary that a rule absolute should be made by the County Court Judge in term for a writ of attachment to issue in accordance with the practice of a Superior Court at common law, it must be upon the notion that the clerk of the peace or commissioner was acting as the delegate of the County Court, whereas the jurisdiction exercised by these officers is an original one. The analogy suggested by the practice at common law of a Superior Court would only be accurate if the clerk of the peace or commissioner had made an order which it was sought to make a rule of Court, and for this there is no provision. Section 53 of the Act provides that failure to

comply with an order to pay a judgment debt by instalments shall render the debtor liable to attachment as for contempt of Court, and that "such attachment may issue out of the County Court on the order of a Judge thereof, after notice." The writer does not see any valid objection to a County Court Judge acting under this section at Chambers, though it is the practice in more than one County Court to issue the attachment only in open Court: see Jones v. Monroe, 33 C. L. J. 578. The writ is issued out of the County Court when it is under the seal of the Court, as effectually upon an order made at Chambers as upon an order made in Court.

A question of no greater difficulty is presented as to the authority of a Judge at Chambers to order commitment under certain other provisions of the Act. By s. 46 it is enacted that, "subject to the provisions hereinafter mentioned, any Court may commit to prison for a term not exceeding one year, or until payment of the sum due, with or without privilege of bail to the limits, any person who makes default in payment of any sum due from him in pursuance of any order or judgment of the Court." Then by s. 47 it is provided that the jurisdiction by the last section given of committing a person to prison, shall in the case of the Supreme Court be exercised by the Court or a Judge thereof, and may be exercised in respect of the judgment or order of any Court; and in case of the County Court, be exercised by the Court or the Judge of any of the County Courts, and in respect of the judgment or order of any County Court or any Court having jurisdiction to a lesser amount than the County Court, and by an order shewing on its face the grounds on which it is issued. Section 49 provides that "the order of commitment, which may be in the form (E), or to the like effect, may be issued on an ex parte application of the plaintiff upon oath, or upon summons and hearing both parties upon oath; provided, however, that no such order shall be issued ex parte unless it is clearly made to appear by affidavit, to the satisfaction of the Court or Judge, that the party against whom the order is

sought is immediately about to leave the province," etc. The form of the order of commitment provided in the Act contemplates that it may be issued by a Judge. The question of construction is whether a Judge at Chambers has power under these sections to commit to prison, or whether the power must be exercised by the order of the Court made in open Court, the contempt being "default in payment of any sum due in pursuance of any order or judgment of the Court," and thus being constituted a contempt of the Court itself. The same rule of practice at common law with respect to attachment prevails with respect to committal, namely, that an order to commit must be made in Court on motion. It is obvious that a rule of Court is not necessary under the Act for the purpose of adopting an order made at Chambers for commitment, for the contempt is not to that, but to the judgment or order of the Court. The expression "Court or a Judge" has repeatedly been recognized to include a Judge at Chambers: see Dallow v. Garrold, 14 Q. B. D. 543; Baker v. Oakes, 2 Q. B. D. 543; In re B., [1892] 1 Ch. 463. In Salm Kryburg v. Posnanski, 13 Q. B. D. 218, the Court had to consider whether Order XLIV., r. 2, of the Supreme Court Rules, read with s. 39 of the Judicature Act, confers power upon a Judge at Chambers to give leave to issue a writ of attachment, and the question was answered in the affirmative. The Rule provides that "no writ of attachment shall be issued without the leave of the Court or a Judge to be applied for on notice to the party against whom the attachment is to be issued," but the difficulty of the question was added by an ambiguity in s. 39 of the Judicature Act. In his judgment Grove, J., says: "If Order XLIV., r. 2, were in affirmative instead of negative terms, there seems to me no doubt that a Judge at Chambers would have been authorized by it to grant attachments?" And a little later he adds: "If the Rule had said 'a writ of attachment shall issue by leave of the Court or a Judge,' it seems to me clear that the power of granting attachments would have been extended to a Judge at Cham-

bers. It is true that the words are negative, and it is not enacted in terms that a writ of attachment shall issue by leave of a Judge, but I am inclined to think that it is a necessary implication from the words of the rule that a Judge at Chambers is to have the power. No meaning whatever can be given to the words 'or a Judge' if this is not so." See also Amstell v. Lesser, 26 Q. B. D. 187. In Freason v. Loe, 26 W. R. 138, Jessel, M.R., considered that the words "Court or a Judge" give to an applicant the option of proceeding either by motion or summons. It therefore does not seem possible to resist the conclusion that s. 47 confers jurisdiction to commit under the Act to a Judge at Chambers. Confirmation of the soundness of this view seems to be abundantly furnished by s. 54 (1) of the Act.

A singular omission, or want of definiteness in respect to this question, occurs in s. 45 of the Act. The section, while autonomous in its provision, is completely silent as to machinery for its enforcement. It provides that arrest and imprisonment may be had and allowed for: (4) Default by an attorney or solicitor in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order; (5) Default by a trustee or person acting in a fiduciary character, and ordered to pay, by the Court of Equity, any sum in his possession or under his control; (6) Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made, etc. No difficulty is created by clause 6, as it obviously refers to orders made pursuant to ss. 46 and 47 of the Act, and which, as we have seen, authorize an order to be made and enforced by a Judge at Chambers as well as by the Court. Under clauses 4 and 5, the jurisdiction to attach would seem to be strictly limited to the Court en banc, and to the Supreme Court in Equity where disobedience was to its order.

A point of considerable nicety and importance involved in the construction of s. 45, relates to whether or not any

discretion is possessed by the Court to order imprisonment in the cases mentioned in clauses 4 and 5. The section is significantly dissimilar from the corresponding section of the Debtors Act, 1869 (Imp.), from which it is taken. Section 4 of that Act, after enacting that no person shall, after its commencement, be arrested or imprisoned for making default in payment of a sum of money, provides that there shall be excepted from the operation of the enactment, inter alia, (3) default by a trustee, etc.; (4) default by an attorney or solicitor, etc.; provided, etc. By excepting the cases enumerated in the section they were left subject to the former law. In equity, it was therefore held that in a case within the exception, there was no discretion in the Court to temper the law in cases of hardship, as where the person in default was guilty of no moral delinquency, and his imprisonment would not be productive of any good. Thus in Evans v. Bear, L. R. 10 Ch. 76, it was held that where a sum of money forming part of an estate was paid into a bank to the joint account of two executors, with power to one of them to draw cheques, and was withdrawn and misapplied by one of them, the Court has no discretion to refuse a writ of attachment against the co-executor, though he was seventy-five years of age, and very infirm, and the imprisonment was considered likely to endanger his life. At common law it had to be shewn, before an attachment would be granted for default in payment of money ordered to be paid by order of a Court, that the party in default had the means of paying and refused or neglected to do so: Re Ball, L. R. 8 C. P. 104. This ruling, of course, would have no application where the proceedings were taken for punitive or disciplinary purposes. In 1878 the English Act was amended by 41 & 42 V. c. 54, by which in any case coming within the Act of 1869, s. 4 (3) and (4), the Court or Judge making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisions contained in s. 4) may grant or refuse, either

absolutely or upon terms, any application for a writ of attachment, or other process, or order for arrest or imprisonment. Acting upon the discretion conferred by this amendment, the Court has declined to grant a writ of attachment against a defaulting trustee, where it appeared that he had no present means, and there was no prospect of future payment: Barnett v. Hammond, 10 Ch. D. 285; Street v. Hope, ib. 286 (n); Re Mackenzie, 44 L. T. 618; or where the misapplication of the money had been made mistakenly but not fraudulently: Holroyde v. Garnett, 20 Ch. D. 532; or where the trustee had received no personal benefit, and was unable to pay: Earl of Aylesford v. Earl Poulett, [1892] 2 Ch. 60; or where the trustee himself had not been guilty of any dishonesty or fraudulent breach of trust, but had trusted his co-trustee, who had misapplied the trust funds: Re Smith, Hands v. Andrews, [1893] 2 Ch. 1. But inability to pay is not a ground in itself for refusing an attachment, where the party in default has been guilty of fraudulent or dishonest conduct. It is held that imprisonment under s. 4 (3) and (4) is not intended as a means only of enforcing payment of a debt, but to punish a fraudulent or dishonest debtor: Middleton v. Chichester, L. R. 6 Ch. 152; Marris v. Ingram, 13 Ch. D. 338; Re Knowles, Doodson v. Turner, 52 L. J. Ch. 685; In re Freston, 11 Q. B. D. 545; Mitchell v. Simpson, 25 Q. B. D. 188; Re Gent, Gent-Davis v. Harris, 40 Ch. D. 194; In re Smith, Hands v. Andrews, [1893] 2 Ch. 1; Re Edgecome, [1902] 2 K. B. 403.

The words in s. 45 of the New Brunswick Act, "arrest and imprisonment may be had and allowed for," etc., are not enabling but mandatory words, and the Court has no discretion under them to withhold a writ of attachment where the applicant makes out a case within clauses 4 or 5. If the words of the section were "arrest and imprisonment may be allowed," then a substantial contention might be put forward that the jurisdiction was discretionary in its nature, and presumably as wide as that conferred in terms by the English amending Act of 1878, though it is extremely

doubtful whether the contention would be upheld. Thus, though the Act 11 & 12 V. c. 42, s. 9 (Imp.), enacts that justices "may" issue a summons on an information laid before them "if they shall think fit," it was held that they were not at liberty to refuse it on any extraneous considerations, such as that the prosecution was inexpedient, or that the law would operate unjustly in the particular case: R. v. Adamson, 1 Q. B. D. 201; R. v. Fawcett, 11 Cox 305; Ex p. Lewis, 21 Q. B. D. 201; R. v. Byrde, 60 L. J. M. C. 17. So, in Blackwell's Case, 1 Vern. 152, Lord Keeper North held that the statute which enacted that the Chancellor should have full power to issue a commission of bankruptcy against a bankrupt trader, on the petition of his creditors, imperatively required that it should be issued; and "may" was declared to be in effect "must." The word "may" in the 13th section of the County Courts Act, 13 & 14 V. c. 61 (Imp.), which provides that in certain cases the Court or a Judge at Chambers may by rule or order direct that the plaintiff shall recover his costs, was held not to give a discretion, but to confer a power upon the Court and Judges: Macdougall v. Patterson, 11 C. B. 755. In Bustros v. White, 1 Q. B. D. 423, it was held that Order XXXI., r. 11, of the Judicature Act, by which it is made "lawful" for the Court to order the production of such documents in the possession of a party relating to the action "as the Court thinks right," gave the Court no discretion to refuse an inspection where the documents were not privileged by law from inspection. While the assistance to be derived from these decisions, if one were construing even identical words, must be very small, as in any instance where they arise for decision their meaning must be determined by considerations exclusively referable to the Act construed, they are of value as indicating that words presumptively permissive may be pronounced to be mandatory. But the section in question must be read as a whole, and the conclusion upon it is inevitable that it was not creating a jurisdiction, but that it was conferring a right upon the subject. If the section is read as though

it were, "arrest and imprisonment may be had," it would be plain that an unqualified right to a writ of attachment was created upon the conditions prescribed in clauses 4 and 5 being satisfied. The strength of these words cannot be overborne by those following, even if it could be imputed to the words "may be allowed," that they were permissive.

The only question which appears to be open upon the meaning of the words is whether they are an enacting and originating provision, or whether they aim only to preserve the former law of imprisonment as to the cases dealt with by s.-ss. 4 and 5. If the latter was the object sought, and it can be imputed to the Act, a reference to the former would be strictly proper, under which, as has been remarked, attachment was issued in equity as of right: Evans v. Bear, L. R. 10 Ch. 76; while on the common law side of the Court the general rule seems to have been that special circumstances had to be shewn, such as that the attachment would enforce payment of the debt: Re Ball, L. R. 8 C. P. 104.

In the event of a defaulter within s.-ss. 4 and 5 of s. 45 of the New Brunswick Act having no means of paying his indebtedness, but whose conduct has been fraudulent or dishonest, the question may be suggested whether his imprisonment will be ordered for a purpose which may be described as vindictive, since it may be said to fail in its coercive effect. A vindictive or punitive application of the Act invites criticism, on the ground that it imports into the Act the character of criminal legislation, and therefore constitutes an invasion of the sphere of legislative power exclusively assigned to the Parliament of Canada by s. 91 of the B. N. A. Act. We have seen that the jurisdiction under the English Debtors Act, 1869, is said to be exercised for punitive purposes where the defaulter has no means of paying his indebtedness, but who has been guilty of fraudulent or dishonest conduct, and language is used in the cases classifying the defaulter as a criminal and punishable as such under the Act. In Ex p. Kinning, 4 C. B.

507, Wilde, C.J., observes that the statute is, to a considerable extent, penal. It gives a power of awarding imprisonment that is not to operate as satisfaction or extinguishment of the debt. The same provision is contained in s. 52 of the New Brunswick Act. In Marris v. Ingram, 13 Ch. D. 338, Lord Esher, M.R., after reading the third exception in s. 4 of the Act, says: "Why is such a person as the last excepted? Simply because he is a dishonest man. He need not perhaps be called a thief in so many words, but he is a man who takes or keeps money belonging to other people, and he is to be punished as such. The Act abolishes imprisonment for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor." In In re Freston, 11 Q. B. D. 545, a defaulting solicitor within s.-s. 4 of s. 4 of the Act is said to be guilty of breaches of duty and breaches of the law, and the rights of those employing solicitors are described as being more than of a civil nature. At p. 555 Brett, M.R., said that in Marris v. Ingram his predecessor took a strong view as to the effect of the provisions of the Act; that he referred to the case of fraudulent trustees as punishable as criminals, and that the statute punished their misconduct as a criminal offence, and that he had an equally strong opinion as to defaulting trustees. With this language he (Brett) did not altogether agree, but he did entirely agree that the statute goes a very long way to shew that a default by a solicitor is an act of a criminal nature. It is manifest that an argument founded upon these words would be wholly futile if an inquiry were omitted as to the nature of criminal law in the sense in which that expression is used in s. 91 (27) of the B. N. A. Act. Without attempting to define criminal law, it is conceived that an act, however immoral, is not criminal unless it is declared to be an offence against the public rather than the individual primarily wronged, and punishable under vindictive and deterrent sanctions. The New Brunswick Act does not command that a trustee or a solici-

tor or an attorney shall not misappropriate money intrusted to him in a fiduciary character under a prescribed penalty. In its origin the default is not made a crime against society, but is dealt with as an ordinary civil liability which the creditor may release or compromise or dispose of at his discretion. Upon the matter being submitted to the Court under the Act, the debtor is not subject to an order for imprisonment, unless he makes default to the order of the Court to pay the indebtedness. The object of the Act is to advance the interests of the individual by affording to him a stringent and coercive remedy for the collection of his debt. The fact that the debtor is without means does not make his imprisonment punitive except in an incidental sense. The object of the Act as a coercive remedy would be defeated if the absence of means could be accepted as an answer to the order of the Court. For the Act to be punitive within the meaning of the words of s. 91 (27) of the B. N. A. Act, it would have to be exclusively so, and the coercive element in the Act would have to be eliminated. The Act is coercive by reason of containing a punitive section, but it cannot be both coercive and punitive. The punitive quality of the Act only arises where it fails in having a coercive effect. It is recognised an an axiom in the construction of the B. N. A. Act that the province has implied power to invade the field of legislative jurisdiction reserved to the Dominion wherever necessary to support or supplement the efficacy of provincial legislation. An illustration arose in Regina v. Wason, 17 A. R. 221, where the validity of an Act of the Ontario legislature prohibiting the selling of skimmed milk without notice to the purchaser, under the penalty of a fine, and in default, of imprisonment with hard labour, was upheld upon the ground that the purpose of the Act being to protect private rights, the province had power to affix to the Act penal sanctions to secure obedience to it. Hagarty, C.J.O., there said: "The local legislature has the exclusive power to legislate on subjects within its jurisdiction and to punish by fine and imprison-

ment. It must be held, as it has been, that they must have the power to enforce obedience by penalties of fine and imprisonment, on conviction by magistrates, etc. This may be called in a sense criminal procedure. But, notwithstanding the reservation of criminal procedure to the Dominion Parliament, must we not hold that there must be a necessary implication of power to the legislature so far to regulate criminal procedure (if that be its proper name), as to provide for the course of trial and adjudication of offenders against its lawful enactments? I think we can well keep the two jurisdictions distinct, and as to each adhere to the rule that where either has the right to legislate on a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment, although subjects such as civil rights, and procedure, civil or criminal, may be apparently interfered with." The constitutional test in cases of this kind is whether the provincial Act, in its motive, essence, and nature, falls within the classes of subjects enumerated in the 92nd section of the B. N. A. Act. If it does, then its quality as valid provincial legislation is not lost by reason of certain penal consequences following upon its disobedience. The New Brunswick Act in question is not only primarily but almost altogether concerned with enforcing the right of a creditor to be paid by his debtor. In this aspect it is within the cognizance of the provincial legislature as legislation relating to property and civil rights. It does not cease to be so because it is sought to make the right of the creditor to be paid effective and coercive by attaching a penal sanction to the order of the Court for the payment of the debt. In Ex p. Ellis, 17 N. B. 593, the constitutionality of c. 38, C. S. N. B., was challenged in respect to s.-ss. 1 and 2 of s. 32, by which a Judge was empowered to make an order to imprison a person making default in payment of a judgment or order, where he had had since the date of the judgment or order the means to pay it, and neglected or refused to pay it, or in case the liability was incurred by

obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which the person in default might be proceeded against criminally, on the ground that it was an indirect attempt to turn a civil into a criminal liability, and therefore was criminal legislation within s. 91 (27) of the B. N. A. Act. The decision of the majority of the Court upholding the validity of the Act, proceeded upon the ground that the Act merely enabled a creditor to enforce payment of an indebtedness, and did not provide for the creation of a crime. The argument was urged by counsel that the defendant under that Act is imprisoned not because he did not pay his debt, but because he had committed an offence, but this contention was based upon the feature of the section authorizing the Judge to determine whether credit was obtained by the commission of an act for which the debtor might be proceeded against criminally. The argument was, therefore, not raised that the Act could not be coercive if the debtor was without means, and to imprison in such an instance would be to give the Act a punitive effect. The Court would, it is conceived, have had no difficulty from this contention, and would not have modified their judgment had it been pressed upon them.

In another view, it may be contended upon high authority, that imprisonment takes place under the Act as a punishment for contempt of Court in disobeying the Court's order, rather than for the purpose of enforcing payment of an indebtedness. See Chenalis Trustee v. Hibbard, [1902] 2 Ch. 784; In re Freston, 11 Q. B. D. 545; In re Gent, Gent-Davis v. Harris, 40 Ch. D. 190; Henderson v. Dickson, 19 U. C. R. 592. This would be conceded without receding from the view that the Act is not criminal legislation. But the argument is suggested not for its bearing upon the main question whether the Act is criminal, or coercive merely, but for the purpose of raising the issue whether the contempt is of a criminal nature so as to be exempt from the claim of privilege, or whether the pro-

ceedings by contempt are intended only as a civil process to enforce a judgment or order for the payment of money, in which case privilege does not apply. If the contempt is of the former class, it would not appear to be consistent with the argument hitherto advanced, that the scope of the Act is coercive. In McWilliams's Case, 1 Sch. & Lef. 169, Lord Redesdale, L.C., says: "There can be no doubt that the thing to be considered is, not the form of the process, but the cause of issuing it; if the ground of the proceeding be a debt, it is process of debt; if the ground be a contempt, as, for instance, disobedience of some order of the Court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature." Again in Long Wellesley's Case, 2 R. & M. 639, Lord Brougham, L.C., says: "The line, then, which I draw, is this: that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not; that he who has privilege of parliament, in all civil matters, matters which, whatever be the form, are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege: that members of parliament are privileged against commitment, qua process, to compel them to do an act; against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance; that in all such matters members of parliament are protected. See also O'Shea v. O'Shea, 15 P. D. 59, where similar language is used. The English Courts have had occasion to consider and apply the distinction defined in these statements in cases falling within the exceptions in s. 4 of the Debtors Act, 1869, and the view is adopted that the contempt is of a criminal nature. In In re Freston, 11 Q. B. D. 545, the person moved against was a solicitor, and

attachment was issued against him for non-payment of a sum of £10 and costs he had been ordered to pay. An attachment having been issued, the solicitor was arrested while on his way from the discharge of professional duties at a police court. Upon the point that the solicitor at the time was privileged from arrest, Brett, M.R., said: "I think it very plain that the privilege did exist, provided that the process upon which he was arrested was of a civil nature. It is clear that there is no privilege from arrest upon a criminal charge; but the privilege does apply as to arrest upon mesne process, and upon judgments for debts and other causes of action: it is clear that the privilege can be successfully claimed by members of parliament, by witnesses going to or coming from courts of justice in obedience to subpœnas, and by solicitors and barristers attending Courts to discharge their professional duties. But then the question arises, whether the privilege extends to arrests or attachments for contempts of Court. The question depends upon the kind of contempt. In the Court of Chancery attachment for contempt might be merely a means of enforcing obedience to a decree, which was a judgment upon a dispute as to a civil right between the parties to the suit; a decree of the Court of Chancery was of the same nature as a judgment of the Courts of common law; and, I think, that as to contempts of this nature, privilege would apply. There were, however, other kinds of contempt in which attachments were granted for the purpose of preventing a breach of the law, and of maintaining the discipline of the Courts, and in those cases the question is whether the attachment is more like criminal or civil process, whether it is more like arrest for a crime, or more like the enforcement of a decree in a suit between parties." A little further in his judgment, after reading the passage already quoted from the judgment of Lord Brougham, he continued: "The words 'provided the commitment be not in the nature of punishment' are very material in the pre-

sent case, as pointing out the limit to be placed upon the privilege claimed. The principle is that process to enforce civil obligations is subject to privilege, but process for acts in the nature of offences is not. Attachments are granted for neglect of obedience to the orders of courts of justice; when they are issued merely for the purpose of enforcing judgments in civil disputes, and when the breach of the order to do or not to do something cannot be said to be in the nature of an offence, then the privilege can be claimed; but where an attachment is issued for a breach of the law, or as a remedy for something that is a breach of the law and in the nature of an offence, no privilege can be claimed. The question therefore is whether if a solicitor disobeys an order made on him in his character as a solicitor, he commits an offence and becomes subject to criminal process, or whether he is merely subject to civil process. Before the Debtors Act, 1869, the Court did exercise a peculiar jurisdiction over solicitors, and they exercised that discipline because solicitors were officers of those Courts, and breaches of their duty as solicitors were offences against those Courts. The Debtors Act, s. 4, s.-s. 4, recognizes and acknowledges that principle; for the power of arrest was retained against solicitors, and apart from this principle there could be no reason for excepting solicitors from the abolition of arrest for debt. The rights of those employing solicitors were not merely of a civil nature, and the Courts dealt with defaulting solicitors on the ground that they had been guilty of breaches of duty and breaches of the law. The statute goes a very long way to shew that a default by a solicitor is an act of a criminal nature, for which he may be punished as for a contempt. The contempt of W. A. Freston was in the nature of an offence, and no privilege can be claimed on his behalf." In In re Gent, Gent-Davis v. Harris, 40 Ch. D. 190, it was held that a person occupying a fiduciary position making default to an

order of the Court under s. 4, s.-s. 3, of the Debtors Act, 1869, could not claim privilege, and the decision was placed upon the grounds laid down in In re Freston. See also Ex p. Van Wart, 35 N. B. 78. It might be said that the section of the English Act is not disciplinary or punitive, because the solicitor or trustee in default could escape imprisonment by paying the sum owing by him, and therefore that the character and essential scope of the legislation in respect to solicitors, attorneys, and trustees is coercive. In In re Freston, Brett, M.R., considered this argument and said that he was not convinced that it was correct. "I do not think a solicitor would be entitled to be released ex debito justitiæ, upon doing the acts commanded, or upon ceasing to do the acts forbidden; he must apply to the Court for an order to release him, and the Court must order the process to be relaxed, and whether or not it is customary to order the solicitor to be released from imprisonment as a matter of course, the Court can always order the solicitor to pay the costs of the application; but the Court could not make such an order, if he could claim to be released as a matter of right." Under the New Brunswick Act it is provided by s. 51 that the order of commitment shall direct the immediate payment of the amount for which default is made, and costs, and, on non-payment of the same, that the defendant be committed. In view of this provision, the argument may very confidently be made that the object of the New Brunswick Act in respect of the section relating to trustees, solicitors, and attorneys, is not punitive but coercive. If that conclusion is accepted, then it must be held that proceedings by contempt against such a person are not of a criminal nature, but are civil proceedings to enforce payment of the debt owing by him. See In re Freston, 11 Q. B. D. at p. 557, where Fry, L.J., says that attachment is mere process, where the party can obtain his discharge ex debito justitiæ, by shewing that he has complied with the order. See also Bailey v. Plant, [1901] 1 K. B. 31; Henderson v.

Dickson, 19 U. C. R. 592; and Ex p. Dakins, 24 L. J. C. P. 131, 16 C. B. 77. It might be that the Court would intervene on its own motion to discipline a solicitor or an attorney where he had made default in paying money ordered to be paid by him in his character of an officer of the Court making the order, but that would be by virtue of its inherent disciplinary power over its officers. See In re Dudley, 12 Q. B. D. 44, and In re Grey, [1892] 2 Q. B. 440; Fawkes v. Griffin, 18 P. R. 48.

Provisions in the Act in constant use, and with which therefore the practitioner should be familiar, relate to the order of a Court or a Judge for the payment of a judgment debt by instalments. The conditions upon which the order will be granted, its form, the procedure to be adopted in event of the debtor failing to comply with it, etc., occasion questions of some difficulty. By s. 45 of the Act it is provided that arrest and imprisonment may be had and allowed for (6) default in payment of sums in respect of payment of which orders are in this chapter authorized to be made. Section 46 provides that "subject to the provisions hereinafter mentioned, any Court may commit to prison for a term not exceeding one year, or until payment of the sum due, with or without privilege of bail to the limits, any person who makes default in payment of any sum due from him in pursuance of any order or judgment of the Court." Section 47 provides that the jurisdiction by the last section given of committing a person to prison, shall, in the case of the Supreme Court, be exercised by the Court or a Judge thereof, and may be exercised in respect of the judgment or order of any Court; and in case of the County Court, be exercised by the Court, or the Judge of any of the County Courts, and in respect of the judgment or order of any County Court, or any Court having jurisdiction to a lesser amount than the County Court, and by an order shewing on its face the grounds on which it is issued. Section 48 enacts in part as follows: "And provided, also, that the said jurisdiction shall only be exercised when

it is proved to the satisfaction of the Court or a Judge, as the case may be (a) that the person making default either has or has had since the date of the order or judgment, or service of the summons or first process in non-bailable actions, or of the service of the writ of capias in actions in which arrest has been made in the suit in which the order or judgment is obtained, the means to pay, in whole or in part, the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the said sum, in whole or in part, to the extent of the means which he has, or is shewn to have had, and if he has ceased to be possessed of such means, then that he has divested himself directly or indirectly of the said means, with intent to defraud the said plaintiff in obtaining satisfaction of the order or judgment, and has refused or neglected, or refuses or neglects, to pay the same; or," etc. Section 49 reads as follows: "The order of commitment, which may be in the form (E), or to the like effect, may be issued on an ex parte application of the plaintiff upon oath, or upon summons, and hearing both parties upon oath; provided, however, that no such order shall be issued ex parte unless it is clearly made to appear by affidavit to the satisfaction of the Court or Judge that the party against whom the order is sought is immediately about to leave the province. If an ex parte order be made, the debtor may apply to the Court or Judge that issued the order, or to any other Court or Judge that would have been entitled to have issued the order in the first instance for his discharge, and on notice to the plaintiff, or his attorney, the matter shall be heard upon oath, and the order of commitment be discharged, varied, or confirmed," etc. By s. 51, "the order of commitment shall direct the immediate payment of the amount for which default is made and costs awarded . . . and on non-payment of the same, that the defendant be committed, and the order shall state whether the commitment be with or without privilege of bail to the limits, and the order of commitment shall be obeyed and executed by the

sheriff, and on failure of payment the defendant shall be imprisoned according to the tenor of the order, and shall be discharged out of custody upon payment of the amount named in the order." Section 53 (1): "In case of judgment, when the judgment debt, exclusive of costs, does not exceed four hundred dollars, and the debtor makes a disclosure, or is brought up for examination under the provisions of this chapter, and it is made to appear to the Judge, or other officer before whom the disclosure is made, or examination had, that such debtor, while unable to pay the whole amount of the debt in one sum, is able to pay the same by instalments, such Judge or other officer may in his discretion make an order that the debtor shall pay the amount of the judgment debt by instalments, which order shall be served upon the debtor. Failure to comply with the terms of such order shall, unless good cause be shewn to the contrary, render the debtor liable to attachment as for contempt of Court. Such attachment may issue out of the County Court on the order of a Judge thereof, after notice," etc. It will be noticed that the jurisdiction to order payment of a judgment debt by instalments is not explicitly stated elsewhere in the Act than in s. 53, and that, if such jurisdiction is conferred in the other sections cited, its existence must be problematical. The argument that immediately recommends itself as decisive against such jurisdiction is that which peremptorily is suggested by s. 53. As it provides for the jurisdiction under limited circumstances, the conclusion would appear to be irresistible that the jurisdiction is not to be found elsewhere by inference or construction.

Under s. 48 (a) the jurisdiction to imprison may be exercised where the person making default has or has had the means to pay in whole or in part the sum in respect of which he has made default (that would mean the sum named in the order or for which judgment was signed), and has refused or neglected or refuses or neglects to pay the said sum, in whole or in part, to the extent of the means which he has,

or is shewn to have had, etc. If the person in default was therefore only able to pay a part of the judgment or order against him, he would not be in default if he paid it, and an order would not go for his commitment. If he did not pay it, except upon an order for commitment being taken out, the order would not be for the payment of the full amount of the order or judgment, but for such part as he was shewn either to have or have had the means of paying. The order would be in this form from time to time until the full amount of the judgment or order was paid. This may not be strictly the same procedure as is prescribed, under s. 53, for the payment of a judgment debt by instalments. It has, however, an effect that is identical with that secured by s. 53. It is when the 53rd section is contracted with s. 51 that a most unusual feature is noticed in the procedure for commitment provided by the latter section. It provides that the order of commitment shall direct the immediate payment of the amount for which default is made, and on non-payment of the same, that the defendant be committed. Section 53, on the other hand, does not embody in the order for the payment of the judgment debt by instalments that if default is made the defendant shall be committed. Upon default being made, further proceedings are necessary before an attachment will be issued. The debtor must be given notice of the application for the attachment, and may, by shewing that the default was not wilful by reason of inability to pay the instalment, successfully resist the application. The reason for the procedure adopted in s. 53 is obvious. At the time the order is made for payment of the judgment by instalments the defendant may be able to pay them. When the time of payment matures his circumstances may have altered. His failure to pay, therefore, cannot be ascribed to perverseness, and he should not be punished for contempt of Court. If the order for payment of the judgment by instalments provided for attachment or committal on default, it would anticipate the default, and determine that it was wilful, whereas an examination of the debtor's circumstances

when the payment fell due might shew that he was without means. Under the Irish Debtors Act, 1872, s. 6, it is necessary, upon an application to commit to prison for non-payment of instalments previously ordered to be paid, to shew by affidavit that at the time of such application the debtor is still in a position to pay the instalments: Davis v. Simmonds, 14 L. R. Ir. 364. And that would appear to be the necessary course under the New Brunswick Act, unless the onus is placed by s. 53 upon the defendant to shew that he has no means. In the case of s. 51 the order directs immediate payment, based upon the Court or Judge being satisfied of the present means to pay or that the debtor has had the means to pay. A fresh inquiry, therefore, is not necessary to prevent injustice being done to the debtor, and the order properly provides that the defendant be committed if immediate payment is not made. The commitment is not made for a future but for a past default, with a provision that it shall not go into effect if the sum upon which default has been made is paid. If an order were made under s. 53 for an attachment, in the event of the defendant making default in payment of an instalment not due, it clearly would be bad; Andrews v. Marris, 1 Q. B. 3; Ex p. Kinning, 4 C. B. 507; Kinning's Case, 10 Q. B. 730; Abley v. Dale, 10 C. B. 62; Dews v. Riley, 11 C. B. 434; Davies v. Fletcher, 2 E. & B. 271; Ex p. Koster, 14 Q. B. D. 597; The Queen v. The Judge of the Brompton County Court, 18 Q. B. D. 213; Stonor v. Fowle, 13 App. Cas. 20. Under the English practice under the Debtors Act, 1869, it is quite usual to direct that the order for committtal shall lie in the office for a limited time or shall not be drawn up if the defendant pays the indebtedness by instalments. In event of default being made in paying an instalment the order goes into effect without any further application to the Court being made. Such a form or order was made in Ex p. Koster, 14 Q. B. D. 597; Harris v. Slater, 21 Q. B. D. 359; and in Stoner v. Fowle, 13 App. Cas. 20. The commitment does not relate in such a case to the subsequent but to the previous default,

and is therefore not a conditional or prospective order. See Stonor v. Fowle, 13 App. Cas. 20. It is conceived that this practice is applicable under the New Brunswick Act, as to attachment under s. 53, and that an order for committal under s. 53 may be suspended for a definite time.

In s. 46, already quoted, it is provided that a person may be committed to prison for a term not exceeding one year, and in s. 45 (6) it is provided that no person shall be imprisoned in any case for a longer period than one year. These provisions suggest the inquiry whether if a debtor is ordered to pay by instalments he can be imprisoned in respect of each default for the full period of one year, or whether repeated imprisonments in such a case may exceed one year. It would appear that under s. 46 he can be, as each failure to pay an instalment would constitute a fresh default and give rise to a fresh power of commitment. The words of the section empower the Court to commit, for a term not exceeding one year, any person who makes default in payment of any sum due from him in pursuance of any order or judgment of the Court. Where an order is made for the payment of a judgment debt by instalments, each instalment is on a separate footing, and if default is made in respect to it it is a "default in payment of a sum due in pursuance of an order of the Court." The committal takes place as to it, and therefore it would seem may be for a year. The question is complicated by s. 45 (6), as it appears to negative the power of imprisonment beyond the term of one year in the case being put. Under the Debtors Act, 1869, of England, it is enacted by s. 5 that "subject to the provisions hereinafter mentioned, any Court may commit to prison for a term not exceeding six weeks any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court." By the 4th section it is provided that no person shall be imprisoned in any case for a longer period than one year. It is held that where a debt is payable by instalments under an order or judgment,

the debtor may be committed for the full period of six weeks for default in the payment of each instalment. See Horsnail v. Bruce, L. R. 8 C. P. 378; Evans v. Wills, 1 C. P. D. 229. Whether the successive imprisonments in the aggregate may exceed one year does not seem to have been determined. In Horsnail v. Bruce, Bovill, C.J., says that the proviso in s. 4 limiting the imprisonment to one year has no reference to default in payment of a debt due in pursuance of an order of judgment of any Court, while in Evans v. Wills, Cockburn, C.J., appears to have thought that the debtor could not be imprisoned under repeated commitments for more than a year in all. The 4th section of the English Act, in the language quoted, is identical with s.-s. 6 of s. 45 of the New Brunswick Act, and the limitation upon the term of imprisonment imposed by s. 5 of the English Act is the same as that of s. 46 of the New Brunswick Act, save that in the latter Act the period is one year instead of six weeks, as in the former Act. It is difficult to appreciate the force of the view expressed by Bovill, C.J., if applied to the New Brunswick Act, that the limitation upon the term of imprisonment fixed by s. 45 (6) relates to the cases enumerated in that section, and is not to be read with s. 46. The section provides that "arrest and imprisonment may be had and allowed for . . . default in payment of sums in respect of the payment of which orders are in this chapter authorized to be made"—a clear indication that orders in the Act, other than those referred to in s. 45, are included in the section, and supporting the conclusion that the provision as to the term of imprisonment is applicable to the other sections of the Act. It was undoubtedly the intention of the legislature that the limitation in s. 45 (6) should be a stringent one, as the general policy of the Act is in favour of the liberty of the subject. The writer would, therefore, favour the view that successive imprisonments in respect to the one judgment, though ordered to be paid by instalments, cannot exceed one year, and this is in accordance with the dictum of Cockburn, C.J., in Evans v. Wills, supra.

While the power to imprison extends to one year, a committal for a shorter term is an answer to an application for a further committal in respect to the default upon which the first committal was made. See Horsnail v. Bruce, L. R. 8 C. P. 378, and Evans v. Wills, 1 C. P. D. 229.

An examination of the Act can scarcely fail to provoke speculation as to why a default under certain provisions of the Act is dealt with by committal, and under other provisions, by attachment. Under s. 36, providing for the oral examination of a judgment debtor or person ordered to pay money by the order of a Court, it is enacted that the disobedience by the debtor of an order to attend the examination or a refusal to answer all proper questions on such examination, shall be punishable by attachment for contempt, and by s. 38 it is provided that a witness refusing to attend and give evidence at such examination, shall also be punished in the same way. Passing to s. 46, we find a general provision applicable to any instance where default is made in payment of a sum due in pursuance of an order or judgment of the Court that the remedy shall be by committal. Section 47 is to the same effect. Sections 49 and 51 expressly provide for commitment by setting out the form of an order therefor and prescribing its contents. Proceeding to s. 53, it is found that the direction is expressed that the procedure shall be by attachment. Reference should also be made to the provision in s. 42 for attachment.

The preservation of the two forms of procedure can hardly be supported upon any substantial ground, since for all practical purposes there is no distinction between them. In Regina v. County Court Judge of Lambeth, 36 W.R. 476, Willis, J., said that there was no practical difference between committal and attachment. "One was enforced by the tipstaff of the Court, and the other by the sheriff. That is all the distinction, and it comes to little, if anything." That distinction would not obtain under the New Brunswick Act, as both attachment and committal are executed by the sheriff. At common law a distinction was made that committal was the

proper remedy for doing a prohibited act, and attachment was the proper remedy for neglecting to do some act ordered to be done. See Callow v. Young, 56 L. T. 147, and In re Evans, Evans v. Noton, [1893] 1 Ch. 260, note. The sheriff was also at liberty to admit to bail in attachment, while the tipstaff had no such power. The writ of attachment was considered to be bailable process: Morris v. Hayward, 6 Taunt., 569; Atkinson v. Mitchell, 6 All. 345; and it was sufficient if the sheriff had the attached person in Court to answer the contempt in accordance with the exigency of the writ: Lewis v. Morland, 2 B. & Ald. 56. It will not be suggested that attachment is provided for under the Act to enable the person attached to be admitted to bail on the sheriff's responsibility until the return of the writ. Nor does the statement that at common law committal was the proper remedy where the act done was a prohibited one, and that attachment was the proper remedy for failure to do an act commanded to be done, afford any solution to the question, for under the Act committal and attachment are granted because of failure to perform an act ordered to be done. The machinery to be employed upon an application for either process is substantially the same. Under s. 36 the attachment is issued upon an affidavit of facts, and apparently without notice to the contemnor, as s. 39 provides for an application to set aside the attachment, etc. Under s. 53 it would appear that notice must be given to the person in default, of the application for attachment, as the section provides that "failure to comply with the terms of such order (that is, the order for payment of the judgment debt by instalments) shall, unless good cause be shewn to the contrary, render the debtor liable to attachment. Such attachment may issue out of the County Court on the order of a Judge thereof, after notice." An order of commitment will not be issued ex parte, except where the party against whom it is sought is immediately about to leave the province. The order of commitment, however, does not go into effect, though taken out, if the debtor makes payment of the amount in de-

fault. It will therefore be noticed that with the exception of s. 39 the procedure is substantially the same as to both committal and attachment. One remedy is no more expeditious in effecting an arrest than the other, as each has to be lodged with the sheriff. The ultimate test is that, had the legislature enacted it, one remedy could have been used as effectively as the other in the cases appropriated to the other. One is compelled reluctantly to admit that the legislation in the respect just considered is unscientific, though happily free from inconvenience in practice.

The position of a married woman under the Act, both in respect to judgments recovered against her at common law and under the provisions of the Married Women's Property Act, C.S.N.B. 1903 c. 78, may advantageously be considered, though the authorities leave the matter comparatively free of doubt. Like the English Married Women's Property Act, 1882, the New Brunswick Act does not interfere with the common law liability of a married woman, which was limited to ante-nuptial contracts, but creates a liability against her separate property with respect to contracts made by her during her marriage. By s. 3 (2) of the New Brunswick Act, a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a feme sole . . . and any damages or costs recovered against her in any such action or proceeding, shall be payable out of her separate property and not otherwise. Sub-section 3 provides that "every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her in respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; (c) shall also be enforceable by process of law against all property which she may thereafter, while discovert, be pos-

sessed of or entitled to." Plainer language could not be used to define that the liability created in respect of a contract made by a married woman during her marriage, is limited to her separate property, and does not extend to her person. The remedy of committal or attachment, being a remedy against the person, can manifestly not be resorted to as against her in respect of such a contract. By the express words of s. 46 of the New Brunswick Debtors Act, the remedy of committal is not applicable, for the right to commit is limited to where a person makes default in payment of "any sum due from him" in pursuance of any order or judgment of the Court. That must mean that the sum must be due from a defendant in a personal sense. But, as the judgment recovered against a married woman under the Married Women's Property Act is payable only out of her separate estate, it is impossible to say that the judgment debt is a sum due from her. If this argument were material for the purpose of negativing the right to commit a married woman, it might be cogently urged that, as s. 53, providing for attachment where default is made in paying an instalment on a judgment debt, does not limit the right to attachment to where a personal liability exists, attachment could not be refused as against a married woman. Considerable importance was attached to the argument in Scott v. Morley, 20 Q. B. D. 110, but, while it may be relevant, it is not material, except as shewing that the Debtors Act is not in conflict with the Married Women's Property Act. If the Debtors Act does not expressly give a right of committal or attachment against a married woman, the right cannot be implied because of the absence of negative words, since the liability under the Married Women's Property Act is expressly restricted to her property. Under the English practice, as settled in Scott v. Morley, a judgment against a married woman upon a contract made by her during marriage, particularizes that it is payable out of her separate property, and that the execution must be limited thereto. See Barnett v. Howard, [1900] 2 Q. B. 784. The same practice prevails in

Ontario: Hammond v. Keachie, 28 O. R. 455. In the event of a judgment not being in this form, in respect of a cause of action upon a contract made during marriage, it is submitted that the defendant would not be subject to committal or attachment. See Watson v. Ontario Supply Co., 14 P. R. 96; In re Widmeyer v. McMahon, 32 C. P. 187.

As will have been noticed, the foregoing remarks are wholly addressed to the question of the liability of a married woman upon a contract made by her after marriage. Where the contract is made by her previously to marriage, the Married Women's Property Act does not apply, and her liability in respect thereto is left as at common law. There a woman could be sued with her husband in respect of such a contract, with the result that if judgment was obtained against them, the wife could be taken upon a capias ad satisfaciendum. The judgment in such an instance is a personal one, and it is therefore conceived that she may be proceeded against by committal or attachment under the New Brunswick Debtors Act. In Scott v. Morley, 20 Q.B.D. 110, Lord Esher, at p. 125, considered that in such a case a married woman could be summoned under s. 5 of the Debtors Act, 1869, and be dealt with accordingly. Robinson v. Lynes, [1894] 2 Q. B. 577, is an express decision that the personal liability of a married woman at common law, upon contracts made by her before marriage, is not taken away by the Married Women's Property Act, 1882, and that the judgment in such a case will not be limited to her separate property. Counsel there remarked that the advantage of such a judgment would be that in the event of the defendant failing to satisfy the judgment she could be committed under the Debtors Act, 1869. A personal judgment may be obtained against a married woman in respect of torts committed by her during her marriage: Greatorex v. Wynne, 36 Sol. Jo. 527; Aylesford v. Great Western Railway Co., [1892] 2 Q. B. 626; Rawlinson v. Lynne (supra).

The decision in In re Turnbull, Turnbull v. Nicholas, [1900] 1 Ch. 180, that an execution by attachment may

issue against a married woman for non-compliance with an order under s. 4 of the Debtors Act, 1869, to pay trust moneys into Court, where the evidence shews that such moneys are still in her hands and have not been lost by a devastavit, is applicable in New Brunswick.

The provision of s. 36 of the New Brunswick Debtors Act for the attachment of a judgment debtor refusing to attend an examination as to what property he has, or refusing to make answer on such examination, extends to a married woman: Standard Bank v. McQuaig, 7 P. R. 356; Metropolitan Loan and Savings Co. v. Mara, 8 P. R. 355; Pearson v. Essery, 12 P. R. 466; Watson v. Ontario Supply Co., 14 P. R. 96; Countess of Aylesford v. Great Western Railway Co., [1892] 2 Q. B. 626; Re Teasdall v. Brady, 18 P. R. 104. A recent case, Re Stewart v. Edwards, 11 O. L. R. 378, 7 O. W. R. 23, appears to be at variance with these decisions.

St. John, N.B. W. H. TRUEMAN.

RECENT CASES FROM THE TIMES REPORTS.*

Appeal.]—In In re Coles and Ravenshear, 23 T.L.R. 32, the Court of Appeal refused to extend the time for appealing, where owing to counsel's mistake as to the nature of the judgment notice of appeal had not been given in time. After considering a number of the authorities the Court came to the conclusion that, having regard to In Re Helsby, [1894] 1 Q. B. 742, the earlier and more elastic practice must be treated as at an end, and that something more than mere oversight or mistake, something making it inequitable to refuse leave, must be shewn in order to deprive the successful litigant of the protection of the limitation clause.

Banks.]—In the just now particularly interesting case of Prefontaine v. Grenier, 23 T. L. R. 27, the Judicial Committee deal with the question of the liability in damages to a shareholder of the president of a bank which failed, the right to damages being based upon alleged misstatements in reports and want of proper supervision of the cashier, who had allowed improper overdrafts. It was held that no misstatements had been made, and that there had been as much supervision as could reasonably have been expected, the general principle that the duly appointed officials of the bank are, in the absence of anything to cause suspicion, deserving of trust by the president and directors, being held applicable.

Company.]—Hinds v. Buenos Ayres Grand National Tramways Co., 23 T. L. R. 6, decides the short point that a tramway company in converting its system into one worked by electric traction, was entitled in dealing with debentures issued to defray the cost, to add, as part of the cost, to the actual outlay on the conversion of each section, interest up to the time of completion on the amounts from time to time expended.

* Including the cases in No. 3, Volume 23.

Copyright.]—The judgment in Macmillan v. Dent, 22 T. L. R. 117, noted 26 C. L. T. 98, as to copyright in some of Charles Lamb's letters, has been affirmed by the Court of Appeal: 23 T. L. R 45. The Court held that the words "author's manuscript" in s. 3 of the British Copyright Act must be construed in their natural sense as something physical, and that the owner of the paper was entitled to obtain copyright of the words upon it or to grant to another the right to publish the words and thereby obtain copyright, and that having granted the right, and publication having been effected, a further transfer of the manuscript did not confer a further right of publication.

Fire Insurance.]—In Home Insurance Co. v. Victoria-Montreal Fire Insurance Co., 23 T. L. R. 29, the Judicial Committee, reversing the judgment of the Supreme Court of Canada, 35 S. C. R. 208, came to the conclusion that where a re-insurance memorandum was attached to an ordinary printed policy of insurance, there was not imported into the re-insurance contract the provision in the policy requiring any action to be brought within twelve months next after the fire. The policy was in their view being used for the purpose of identifying the risk.

Intoxicating Liquors.]—It is held in Peckover v. Defries, 23 T. L. R. 20, that under s. 3 of the Licensing Act, 1872, which provides that no person shall sell any intoxicating liquor without being duly licensed to sell the same, it is an offence for an unlicensed person to sell his own intoxicating liquor at licensed premises, the business being nominally that of the licensee.

Life Estate.]—Under the settlement in question in In re McClure's Settlement, 23 T. L. R. 42, the trustees held property which was under lease and incurred expense in seeing that the lessees made certain repairs. The income, after payment of "outgoings," was payable to a named person for

life. The expense in question was held not to be an outgoing, and to be apportionable between the tenant for life and the remaindermen, the apportionment being best effected by raising the amount by mortgage of the trust property.

Light.]—In Jolly v. King, 23 T. L. R. 1, the judgment of the majority of the Court of Appeal, 21 T. L. R. 128, affirming the judgment at the trial in the plaintiff's favour in an action for obstruction of light, was affirmed as a result of an equal division of opinion, the difficulty in applying the principle laid down in Colls v. Home and Colonial Stores, [1904] A. C. 179, 20 T. L. R. 475, viz., that the obstruction complained of must be in effect a nuisance, arising from the fact that the Judge at the trial had found that though there had been a substantial interference with the light, the room in question was still a well lighted one.

Lottery.]—A newspaper publisher distributed gratuitously a quantity of medals each bearing a number. Prizes were given to the holders of certain numbers, the selection being arbitrary and the names of the winners being announced in the newspaper. The obtaining of a prize was not conditional upon the purchase of a copy of the newspaper, and the object of the scheme was to advertise the newspaper. It was held however (Willis v. Young, 23 T. L. R. 23) that this was in effect a lottery, and therefore within the prohibition of the Gaming Act, 1802.

Motor-car.]—DuCros v. Lambourne, 23 T. L. R. 3, is a useful case, deciding as it does that the owner of a motor-car, who is in the car while another person (not his servant) is driving with his consent, is liable to conviction as a principal, when that person drives at a speed dangerous to the public in breach of the statutory prohibition.——Bastable v. Little, 23 T. L. R. 38, is also of interest. There a man warned the drivers of several motors that constables were on the watch to time the speed along a road upon

which distances had been marked. This was held not to be an obstruction of the constables in the execution of their duty, though under the section in question, s. 2 of the Prevention of Crimes Act, 1885 (see Criminal Code, s. 144), there may be, the Court decide, obstruction other than physical obstruction.

Payment into Court.]—It was held in James Tucker S. S. Co. v. Lamport, 23 T. L. R. 10, that where action was brought in respect of three separate claims—a balance of freight; a sum overpaid to the defendants on loading account; and damages for demurrage—a general payment into Court was improper, and the defendants were ordered to give particulars stating how much had been paid into Court in respect of each claim.

Railways.]—The judgment of the Judicial Committee, affirming that of the Supreme Court of Canada, upholding the validity of the Dominion legislation prohibiting railway companies from contracting against liability to pay damages for injuries suffered by their servants through the companies' negligence, is reported 23 T. L. R. 40, sub nom. Grand Trunk Railway Company v. Attorney-General for the Dominion of Canada.

Restraint of Trade.]—By the agreement in question in Reeve v. Marsh, 23 T. L. R. 24, the defendant, who had been engaged by the plaintiff as a traveller, undertook that he would not on the termination of his engagement or within two years thereafter, without the consent in writing of the plaintiff, either in his own name or in the name or names of any other person or persons, directly or indirectly, interfere with, prejudice, or in any manner affect the trade or business or reputation of the plaintiff, or solicit the latter's customers. It was held that this did not prevent the defendant from setting up a rival business, provided he did not solicit the plaintiff's customers.

Seduction.]—In an action for damages by a master for seduction of his servant, he is, it is held in McKenzie v. Hardinge, 23 T. L. R. 15, where he is not the parent of, or related or in loco parentis to, the servant, entitled to recover only his actual loss and expense and not general damages.

Separate Schools.]—The judgment of the Judicial Committee, affirming that of the Court of Appeal for Ontario, as to the qualification as teachers of Christian Brothers, is reported 23 T. L. R. 29, sub nom. Brothers of the Christian Schools v. Minister of Education of Ontario.

Street Railway.]—A by-law of a tramway company providing that passengers when required so to do should deliver up their tickets or pay their fares was held in Hunt v. Green, 23 T. L. R. 19, to be a reasonable by-law, and to apply in the case of a passenger who had paid his fare, but had lost his ticket. Compare Grand Trunk R. W. Co. v. Beaver, 22 S. C. R. 498.

Will.]—A provision in a will that the trustees might retain any of the investments of the testator for such period as to them might seem proper, was held in In re Bates, Hodgson v. Bates, 23 T. L. R. 15, to justify the trustees in retaining shares of a speculative character but of good standing, the tenant for life being, it was also held, entitled to the whole income therefrom while so retained.

THE LATEST ONTARIO DECISIONS.*

Accident Insurance.]—A new trial was ordered in Thomson v. Maryland Casualty Co., 8 O. W. R. 598, by the Court of Appeal, because the jury had found that a statement in the application that the deceased had never been refused insurance was untrue, but had made no finding as to whether such statement were material or otherwise. Though the policy in question was an accident and health policy, it was held that the words "application for insurance," in the connection mentioned, included applications for life insurance.

Administrator Pendente Lite.]—It was decided by Meredith, C.J., in Re Gooderham, 8 O. W. R. 685, that though, by virtue of s. 35 of the Surrogate Courts Act, where a case has been removed into the High Court under s. 34, the High Court may have power to appoint an administrator pendente lite, such an order should not be made until the case has been so removed, and a motion for such an order joined with a motion to remove was dismissed.

Appeal to Privy Council.]—The point decided by Garrow, J.A., upon an application by the defendants in Preston v. Toronto R. W. Co., 8 O. W. R. 753, to allow security on an appeal to the Privy Council from the judgment of the Court of Appeal, was that a plaintiff in a superior Court may, at any stage, abandon part of his claim, and, upon his doing so, only the remainder can be said to be in controversy. Here the judgment appealed from awarded the plaintiff $1,000 of the $5,000 claimed in his statement of claim and the plaintiff swore that that was all he claimed or would claim in any event, and the application, on this

* Short notes of the most important cases in Volume VIII. of the Ontario Weekly Reporter, Nos. 17, 18, 19, 20, 21, pp. 579 to 854, inclusive.

ground, apart from the effect of an alleged agreement at the trial that the damages, if any to be recovered, should be $1,000, was refused.

Arbitration and Award.]—A submission to arbitration was held by Magee, J., in Ryan v. Patriarche, 8 O. W. R. 811, not to be an answer to an action, where the time within which the award should have been made had expired, without any award having been made, and without any extension in writing as provided in the submission. It was urged by the defendant that the plaintiff was an assenting party to proceedings by the arbitrators after the time mentioned, but the Court pointed out that the assent would be equivalent only to a parol submission, and could not have been made a rule of Court under 9 & 10 Wm. III. c. 15, nor could an application for stay of proceedings under the Common Law Procedure Act of 1856, s. 91, or the Arbitration Act, R.S.O. 1897 c. 62, be made, and, while it might be argued that, inasmuch as s. 10 of the latter Act attaches to every submission in writing the liability to be extended by the Court, it is always an existing submission though the time has passed, the matters before the Court must be dealt with as they stand, and there was no certainty that any extension would ever be granted: Cooke v. Cooke, L. R. 4 Eq. 77.

Bankruptcy and Insolvency.]—An appeal by the plaintiffs in Robinson v. McGillivray from the judgment of a Divisional Court, 12 O. L. R. 91, 7 O. W. R. 438, noted 26 C. L. T. 351, was dismissed by the Court of Appeal: 8 O. W. R. 602.——An appeal by the defendants in Allan v. McLean from the judgment of Clute, J., 8 O. W. R. 223, noted 26 C. L. T. 574, was dismissed by a Divisional Court: 8 O. W. R. 761.

Benefit Society.]—The decision of Riddell, J., in Zilliax v. Independent Order of Foresters, 8 O. W. R. 631, is authority for the proposition that an action does not lie

at the instance of a member of a benevolent society for the purpose of asserting certain rights as such member, where the proper body of officials has decided against him, and an appeal is provided by the constitution against such decision, unless he has taken such appeal, even though the society do not dispute the jurisdiction of the Court.

Chose in Action.]—The evidence of the defendant in McMurchie v. Thompson, 8 O. W. R. 637, corroborated, as it was, by two writings by which her deceased husband purported to assign to her all his estate, including specifically his interest in the estate of his deceased father, satisfied Anglin, J., that the husband had done everything in his power to make a complete assignment of such interest, incapable, as such fund was, not arising out of contract, of being legally transferred, and that, therefore, there had been a good equitable assignment, and as the fund in question was property over which courts of equity had equitable jurisdiction, the assignee could sue therefor in her own name. On the question whether notice had been given to the executors, the trustees of the fund, the Court accepted the positive evidence of the defendant and her brother, who went to one of the executors for the express purpose of giving him notice, in preference to the negative evidence of the executor, and held that notice to one executor, not being the assignor, was effective.

Company.]—Fischer v. Borland Carriage Co., 8 O. W. R. 579, was an action for delivery up and cancellation of a promissory note given in payment of stock in the defendant company. Anglin, J., decided that the plaintiff could not succeed on his plea that there had been no allotment of these shares, for, while a resolution of the board of directors authorizing an agent to sell stock was doubtless ineffective as a delegation of their discretion in the matter of the allotment of shares, the defendant company, having accepted and discounted the plaintiff's note, allowed him to hold a shareholder's certificate, entered him upon

their stock book as a shareholder, and even pressed their claim upon him in respect of the note before he repudiated liability, had, by acts which admitted of no other construction, fully recognized his position as a shareholder, and conclusively ratified and accepted the contract which their agent had purported to make on their behalf.——An appeal by the plaintiffs in Sovereen Mitt, Glove, and Robe Co. v. Whiteside, from the decision of MacMahon, J., 8 O. W. R. 279, noted 26 C. L. T. 691, was dismissed by a Divisional Court: 8 O. W. R. 582.

Constitutional Law.]—It was decided by Falconbridge, C. J., in International Text-book Co. v. Brown, 8 O. W. R. 835, that the Act respecting the Licensing of Extra-Provincial Corporations, 63 V. c. 24, was intra vires of the legislature of Ontario, as being a made of direct taxation within the province, or as relating to the issuing of a license in order to the raising of a revenue, under s. 92, s.-ss. 2 and 9, of the British North America Act.

Contract.]—A Divisional Court, in Sherlock v. City of Toronto, 8 O. W. R. 646, distinguished Bush v. Trustees of the Port and Town of Whitehaven, Hudson's Building Contracts, 2nd ed., vol. 2, p. 121, because in that case the plaintiff began his work within the time allowed for completion thereof, but was prevented by the action of the defendants from completing it, while in the case at bar the action of the defendants in delaying the construction of the building upon which the plaintiff was to do the work, prevented his commencing it within the time allowed by the contract for completion, and, though the plaintiff had before beginning work demanded the extra cost entailed by the rise in price of materials and labour, there was nothing in the nature of a contract to bind the defendants to pay it, and, pursuant to notice by the defendants' architect to carry out his contract, having gone on and completed the work, he must be deemed to have abandoned any claim for increased remuneration.

Costs.]—A "reasonably satisfactory" reason for depriving the defendant, who had the verdict of a jury in his favour, in an action for defamation, of the benefit of the usual indemnity as to costs, in the opinion of Britton, J., in Byers v. Kidd, 8 O. W. R. 759, under Rule 1130, as distinguished from "good cause" within the meaning of English Order LXII., was the conduct of the defendant in provoking the litigation by, after a first altercation, assaulting the plaintiff, and, after his informant had withdrawn the slanderous statement, repeating it to the plaintiff, and saying he could prove it.

Criminal Law.]—The Court of Appeal decided in Rex v. Burr, 8 O. W. R. 703, that the corroborative evidence required to support a charge of seducing a girl under 16 years of age, by s. 684 of the Criminal Code, is not necessarily that of another witness or witnesses to the acts charged. Evidence that the accused was seen on more than one occasion taking improper liberties with the girl, that he had on at least two occasions expressed a strong desire for sexual intercourse with her, and that he had, after the alleged offence, made a statement from which it might not unreasonably be inferred that he had availed himself of the opportunity afforded him through the absence from home for some days of the girl's parents, during which he was left in charge of the house where the girl and her young brothers and sisters were, was all admissible and should not have been withdrawn from the jury. The Court exercised the discretion conferred by s. 746 of the Code, and ordered a new trial at the instance of the Crown.

Crown.]—It was decided by Meredith, C.J., in Independent Cordage Co. of Ontario v. The King, 8 O. W. R. 723, that the fact that a contract between the suppliants and the Inspector of Prisons and Public Charities of Ontario, as a corporation sole on behalf of the Crown, for the manufacture of binder twine in the cordage building at the Central Prison, had been ratified by a resolution of the Legis-

lative Assembly, did not make such contract or give it the force of a statute of the province, and that, even if it had such effect, it would still have been open for the executive government to have modified the terms of such agreement without any similar ratification, though it was unnecessary to decide this question, as the subsequent agreement, embodying, as it did, most of the terms of the first, was held to be a new agreement which it was competent for the executive to enter into, and was binding upon the Crown. Certain disbursements claimed by the suppliants were allowed them, for the reason, among others, that accounts had been furnished and balances struck, shewing the deduction of these disbursements from the gross amount payable by the suppliants, and balances struck, and these accounts, after proper checking, entered in the books of the prison and treated as the accounts between the parties and as evidencing the condition of matters.

Division Court.]—The price of the coat sued for in Re Taylor v. Reid, 8 O. W. R. 623, being $45, the case was within the Statute of Frauds. Hence it was necessary for the plaintiff to prove not only delivery of the coat to the express company (the defendant's carriers), but also acceptance thereof by the defendant at Belleville. Teetzel, J., decided that the "whole cause of action" did not arise in the territory of the 1st Division Court in the county of York, wherein the coat was ordered and made and whence it was shipped to Belleville. An appeal by the plaintiff was dismissed by a Divisional Court: 8 O. W. R. 763.

Drainage.]—The report of the township engineer, and the by-law in reference to the scheme of drainage therein contained, were declared void by the Court of Appeal in Re McKenna and Township of Osgoode, 8 O. W. R. 713, because of a delay of some five years between the filing of the petition and the report, which deprived the petitioners and others interested of the protection given by s.-ss. (8) and (9) of s. 9 of the Drainage Act, for, though the council

had from time to time assumed to extend the time for filing the report, the power to extend was dependent upon the inability of the engineer, owing to the nature of the work, to make the report within the time allowed therefor, whereas the only excuse of the engineer was press of other work and lack of assistance. Moreover, when they did assume to make extensions, the engineer allowed the periods so given to expire, so that there were times when the engineer had no authority whatever. Assuming to again extend the period after such expiry was not employing another engineer within s.-s. (9).

Fatal Accidents Act.]—The defendants sought to have the two actions of Gyorgy v. Dawson, 8 O.W.R. 784, dismissed after verdicts in favour of the plaintiff, on the ground that the two deceased men for the deaths of whom the actions were brought under the Fatal Accidents Act, were aliens and the beneficiaries aliens resident abroad, and that the latter as such aliens were not entitled to the benefit of the amendment to the Act, being s. 2 of R. S. O. 1897 c. 135; but Mulock, C.J., on the authority of Davidsson v. Hill, [1901] 2 K. B. 606, held that the plaintiff (the administrator of both the deceased) was entitled to maintain these actions, pointing out that the argument would equally apply to the case of British subjects resident in another province, who, if it availed, could not recover in such cases, which could not have been the intention of the legislature.

Highway.]—An appeal by the plaintiff in Hobin v. City of Ottawa from the judgment of Mabee, J., 8 O. W. R. 101, noted 26 C. L. T. 580, was allowed by a Divisional Court, because since the iron lid of the manhole in the street into which the plaintiff fell could have beeen removed only by a stranger by the use of a pick, or a similar instrument, or some violent blow causing sufficient disturbance to displace it, and there was a possibility on the evidence that the defendants' employees had negligently left it out of place, the latter inference was, in the cir-

cumstances, the proper one to be drawn. In case the cover were displaced by the blow of a passing vehicle owing to its proximity to the curb, the defendants were negligent, having regard to the situation and the abnormal amount of traffic at the point, in not providing some lock or fastening for the cover: 8 O. W. R. 589.——A committee of the council of the defendants in Biggar v. Township of Crowland, 8 O. W. R. 819, lawfully appointed and directed to meet on the side of a road where a ditch was to be constructed to let contracts for the same, proceeded to that point with the plans and specifications prepared by the engineer, and, for the purpose of shewing to intending contractors the construction of the ditch, drove in the travelled portion of the road, and very near to the centre, certain stakes, which they left projecting 6 inches above the ground. In the dusk of the same evening the plaintiff walking along the road struck her foot against one of these stakes, which was invisible to one standing up, and was thrown to the ground and injured, and in respect of this injury the action was brought. Mulock, C.J., held that the accident was the result of misfeasance and not of non-repair, and the council having authorized the committee to do what was expedient in letting the contract, the planting of the stakes was within the scope of their authority, and, for such tort as was the result of the negligent planting thereof or the omission to place a light at the spot, the defendant corporation were liable.

Interest.]—A charge for interest sought to be made on behalf of the Crown in Independent Cordage Co. of Ontario v. The King, 8 O. W. R. 723, was disallowed by Meredith, C.J., because the practice throughout the transaction in question was not to compute interest in the way the Crown then sought to have it computed. The provincial auditor did not deal with the account on that basis, and what was done could not, after the lapse of years and several accountings between the parties, be undone.

Judgment.]—In Green v. George, 8 O. W. R. 787, a Divisional Court affirmed the judgment of Britton, J., 8 O. W. R. 247, noted 26 C. L. T. 581, but gave the plaintiff the same indulgence as to defending the original action that had been offered below. Anglin, J., delivering the judgment of the Court, said that the propriety of directing that a question as to the validity of a default judgment, impugned because of alleged defects in the indorsement of the writ of summons, should be determined by the trial of an issue, was open to grave doubt.

Justices of the Peace.]—Comment was made by a Divisional Court in Rex v. McArthur, 8 O. W. R. 694, upon the conduct of the justices of the peace who convicted the defendant for selling intoxicating liquor without a license contrary to the Liquor License Act, in sending for and being closeted with the private prosecutor, the license inspector, for a period variously estimated as from 15 minutes to an hour or more, after they had retired to consider their decision and before announcing it. As all three swore that nothing was discussed or mentioned except the amount of costs to which the witnesses were entitled, this conduct was not considered sufficient to warrant the quashing of the conviction, but the magistrates and inspector were deprived of costs. The rule of the King's Bench Division that if there were any evidence upon which a conviction could be based, the Court would not consider the weight of evidence, was affirmed, the new member of the Court delivering the chief judgment

Life Insurance.]—The person insured under a life insurance policy having borrowed $2,000 from the plaintiff in Thomson v. Macdonnell, 8 O. W. R. 721, gave him a signed writing stating that "for collateral security, I have placed aside and assigned to you a policy of insurance in the Standard Life Company for similar amount." This was held by Boyd, C., to be a good and sufficient assignment in law to entitle the plaintiff, after the death of the

insured, to a balance of the insurance moneys in the hands of the defendant, and this as against other creditors of the insured.

Local Option By-law.]—A motion to quash a local option by-law, good on its face, was refused by Mulock, C.J., in Re Robinson and Village of Grimsby, 8 O. W. R. 689, where it did not appear that any disregard of the formalities required to be observed by the municipality in connection with the voting upon such by-law, such as a failure to advertise the same by a publication that satisfied the statutory requirements, was intentional, or that the result was affected thereby, on account of the delay (eight months) in making the application.——The fact that supporters of a local option by-law had raised a fund with which it was intended, in the event of the by-law passing, to establish a temperance hotel, was held by Meredith, C.J., in Re Leahy and Village of Lakefield, 8 O. W. R. 743, not to be bribery within s. 245 of the Municipal Act, and a charge of undue influence under s. 246 was held not to be satisfactorily made out by an affidavit in which it was set forth that the deponent had heard persons supporting the by-law make certain statements as to withdrawing trade, and his belief that that influenced voters.

Master and Servant.]—Upon an appeal by the defendants in Schwoob v. Michigan Central R. R. Co. from the judgment of Teetzel J., refusing a nonsuit and directing judgment to be entered for the plaintiff for $9,000, at a second trial, directed by the judgment of a Divisional Court, 5 O. W. R. 157, 9 O. L. R. 86, noted 25 C. L. T. 157, affirmed by the Court of Appeal, 6 O. W. R. 630, 10 O. L. R. 647, noted 25 C. L. T. 696, the Court of Appeal held that, while no case had been established at common law, having reference to the Judge's charge, the answers of the jury, and a conversation between the Judge and jury when they brought in their answers, it was established that the death of the plaintiff's husband was caused by a defect in the

condition of the locomotive on which he was working, that this defect consisted in the improper way in which one Jeffers fixed the tubes in the boiler, and that he was the person who had been intrusted by the defendants with the duty of having this properly done, which was all that was necessary to satisfy the requirements of ss. 3 (1) and 6 (1) of the Workmen's Compensation Act, and the judgment was accordingly varied to limit the amount recoverable to the alternative amount ($3,240) found by the jury: 8 O. W. R. 710.——Fleuty v. Orr, 8 O. W. R. 793, turned upon the question whether the man who caused the injuries sued for was the servant of the defendant. The circumstances were that the defendant, an hotel keeper, secured a pair of horses and an omnibus for the transportation of passengers and luggage between his hotel and the railway stations, and arranged with M. that the latter should have the use of the omnibus in consideration of paying the defendant 70 or 75 cents per day for the use thereof and the feed of the horses, and the carrying between the hotel and the railway station, free of charge, of all persons patronizing the defendant's hotel, and should be at liberty to keep for his own use what he made from carrying other passengers and luggage. A Divisional Court held that the exercise by the defendant of personal control over M. would interfere with the enjoyment by the latter of his rights under the arrangement mentioned; that as a matter of fact the defendant had never attempted to control M., nor had he submitted to the defendant's directions; and that the relation of master and servant did not exist between them, but that of bailor and bailee.

Medical Practitioner.]—In the much discussed case of Re Crichton, 8 O. W. R. 841, it was charged that the appellant had advertised his remedy "Grippura" by means of circulars, and was by reason of so doing guilty of infamous and disgraceful conduct in a professional respect. To a finding of guilty on this charge, the medical council added

a rider to the effect that the accused endeavoured to impose upon the credulity of the public for the purpose of gain by attempting to deceive such persons as might read the advertisements. Particulars had been refused the accused. A Divisional Court considered that this latter charge should have been formulated at the outset; that the words "infamous in a professional respect" must not be read as "infamous in a professional aspect," and while, in respect of the matters originally charged, the conduct of accused may have been obnoxious and opposed to professional ethics, it was not such as, in the view of honest men, which is the criterion, would be considered infamous. Besides, at the time the accused was admitted to practice, there was no code of ethics in force here. It was ordered that the accused's name be restored, without prejudice to a subsequent inquiry.

Municipal Elections.]—Upon a motion in Rex ex rel. Hunt v. Genge, 8 O. W. R. 583, under s. 33 of 3 Edw. VII. c. 18, to void the election of the respondent as reeve of the village of Alvinston, on the ground that he was disqualified and had forfeited his seat by reason of having certain contracts with the corporation, contrary to the provisions of s. 80 of the Consolidated Municipal Act, 1903, it was decided by MacWatt, Co. C.J., that the relator, having known of and acquiesced in the respondent's actions for 9 months, had lost his right to relief. An appeal by the relator was dismissed by Britton, J.

Negligence.]—It was decided by a Divisional Court in Burtch v. Canadian Pacific R. W. Co., 8 O. W. R. 837, that it was competent for a jury to find, in a particular case, that a railway company using a hand-car in the ordinary manner, and having no obligation imposed upon them by the statute with reference to signals or notice, were bound to give notice, and that their neglect in so doing was negligence. The defendants were held not entitled to avail themselves, for the purpose of making out contributory

negligence, of a by-law of the municipality levelled against "coasting," the obvious purpose of which was to prevent interference with the proper use of the streets. Moreover, this by-law did not make "coasting" an offence unless the person who did it had been warned, and the plaintiff had not been. Having regard to the plaintiff's tender years, the location, and the circumstances, it was for the jury to decide whether or not he was guilty of contributory negligence, and their finding could not be disturbed.

Parliamentary Elections.]—An attempt was made in Re Port Arthur and Rainy River Provincial Election, Preston v. Kennedy, 8 O. W. R. 606, to support an appeal from a sort of interlocutory ruling of one of the trial Judges holding a scrutiny of the votes cast at the election. But the Court of Appeal held that the only appeal given by the Ontario Controverted Elections Act—except an appeal from the decision of a Judge in Chambers upon an interlocutory matter—is an appeal from the decision of the trial Judge or Judges which disposes of the whole matter of the petition, as mentioned in s. 55, or from a disagreement of the Judges at the trial upon questions which, if they had agreed in deciding them, would have done so. The question which Teetzel, J., decided, and upon which the appeal was launched, was itself an interesting one. The petitioner, upon the scrutiny, proposed to attack a number of the respondent's votes as being invalid on the ground of the alienage or non-age of the voters, and, without passing upon the case of any individual vote, the learned Judge decided that, as against the votes of persons whose names were on the list of voters as finally revised, these grounds of objection were open to the petitioner. This ruling was held not to be the subject of an immediate appeal, but Meredith, J.A., dissented, and was in favour not only of entertaining the appeal but of allowing it, upon the ground that the ruling was contrary to the decided cases.

Parties.]—The owner of the property known as the Gilmour Hotel in the city of Ottawa, destroyed by fire in September, 1906, and the city corporation, were held by the local Master at Ottawa in Campbell v. Cluff, 8 O. W. R. 740, to be properly joined as defendants in an action for damages sustained by a person injured by the fall of a wall of the hotel building which had been left standing, the claim against the owner and the corporation being in respect of the same act or omission, though on different grounds, the alleged liability of the latter being put upon the grounds of the non-repair of the highway by reason of the wall and the neglect of a duty said to have been assumed by the passage of a by-law giving the corporation power to take down and remove the wall: see Hinds v. Town of Barrie, 6 O. L. R. 656, at pp. 661 and 662. Baines v. City of Woodstock, 6 O. W. R. 601, was distinguished, because there the causes of action were not only distinct, but did not arise at the same time. An appeal by the city corporation was dismissed by Meredith, C.J.: 8 O. W. R. 780.

Payment into Court.]—Upon an appeal by the trustee of a fund from an order directing the person in whose hands the fund actually was, on his own application, to pay the same into Court, a Divisional Court in Re Preston, 8 O. W. R. 828, affirmed such order, for the reasons that the applicant having received the fund knowing of the trust became a trustee de son tort, and by the document of acknowledgment given by him to the trustee, an express trustee thereof, and entitled to the relief in question under the Trustee Relief Act, R.S.O. 1897 c. 336, ss. 2 and 4; and that the cestui que trust being an infant, and the parties before the Court, there was power motu proprio to make the order, or, at least, to direct the official guardian to intervene and make a substantive motion. Besides, were the order vacated and an action brought by the trustee, the Court would, on the application of either party or the official guardian, order the fund to be paid into

Court. It was urged that the holder of the fund by arrangement with the trustee become her debtor, and that the matter should be settled on that basis, but that was considered not to affect the matter, because such a contract was illegal.

Pleading.]—In Harrison v. Boswell, 8 O. W. R. 635, the plaintiff in his original statement of claim sought to recover against the defendant Boswell, as the owner of certain premises, the value of repairs which the plaintiff did, and against the defendant Kincaid on a promise by the latter to pay for them. An application to amend by alleging fraud on the part of Kincaid in obtaining money from the plaintiff which was held by him in trust for Boswell, was allowed by Britton, J., because the parties had been examined at length upon the case the plaintiff by the amendment desired to present, and a great saving in expense would result, and because he thought the case was one within the exception to the rule as to refusing amendments charging fraud, the amendment being one that could be made without injustice to the other side.

Police Magistrate.]—A Divisional Court refused to quash the conviction of the defendant in Rex v. Spellman, 8 O. W. R. 700, for selling intoxicating liquor without a license in the village of Lakefield, on the ground that the convicting police magistrate had no jurisdiction. The magistrate was in 1882 appointed police magistrate for the town of Peterborough, and still holds the office for the city. In 1886, pursuant to 41 V. c. 4, s. 9, he was appointed a police magistrate for the county, and in 1889, pursuant to 45 V. c. 17, s. 1, another person was appointed a police magistrate for the county. It was decided that the appointment of the latter was not in the place and stead of the former, whose appointment was not thereby revoked, and, further, that under R. S. O. 1877 c. 72, ss. 4 and 7, continued by R. S. O. 1897 c. 87, ss. 27 and 30, and having

regard to s. 350, the convicting magistrate, as police magistrate for the city, and adjudicating in the case in question, was within his jurisdiction.

Public Schools.]—An interesting question of school law was considered by Magee, J., in McFarlan v. Greenock School Trustees, 8 O. W. R. 672, and it was held that at a special meeting of ratepayers called by the trustees of a rural school section to consider a new school site selected by them, a poll was properly demanded and forthwith held, and that farmers' sons were entitled to vote.

Restraint of Trade.]—The decision of Mabee, J., in Anderson v. Ross, 8 O. W. R. 691, was that the engaging for a stated salary to manage the business of another, was not a breach of a covenant that the person so engaging should not carry on or engage or be interested, directly or indirectly, in any business within certain prescribed limits which should compete or interfere with the business of the covenantee.——A covenant by which it was provided that the defendant should not for 12 months after the expiration of his contract of hiring with the plaintiff "enter into the employ of any party or parties engaged in the sale of tea or house to house sale of tea, in the province of Ontario," was held by MacMahon, J., in Harvison v. Cornell, 8 O. W. R. 697, on account of the restricted territory over which the plaintiff's business was carried on, to be oppressive and void.

Specific Performance.]—The plaintiffs in Acme Oil Co. v. Campbell, 8 O. W. R. 627, sued for specific performance of an agreement with the defendant for a lease of certain lands with the exclusive right of operating for oil, gas, and mineral, but were held by MacMahon, J., not entitled to succeed because the agreement set forth that the lease was to be made at such time as the plaintiff should "move a drilling rig into this immediate vicinity," so that no definite time was stated for the commencement of the lease, nor

was the period of its duration stated, both of which were necessary to satisfy the Statute of Frauds. Also an addition was made to the agreement after it was signed by the defendant without his consent.

Statutes.]—Upon a case stated by the Lieutenant-Governor of Ontario, by order in council, as to whether a person undertaking or attempting for reward to cure or alleviate disease, practises medicine within the meaning of s. 49 of the Ontario Medical Act, where the remedy or treatment advised or prescribed does not involve the use of drugs or other substances, which have or are supposed to have the property of curing or alleviating disease, the Court of Appeal decided, "That each case must depend or be determined on its own circumstances; but dependent upon the facts in each case there *may* be a practising of medicine which does not involve the use of drugs or other substances having or supposed to have the property of curing or alleviating disease." Section 1 of R. S. O. 1897 c. 84 was held to be wide enough in its terms to include the question submitted: Re Ontario Medical Act, 8 O. W. R. 766.

Surrogate Court.]—It was decided by a Divisional Court in Re Wilson and Toronto General Trusts Corporation, 8 O. W. R. 677, that Con. Rule 642 does not confer upon a Surrogate Court jurisdiction to vacate an order made by mistake or procured by the fraud of the party obtaining it, because the operation of the Rule in question is in substitution for the practice in the Court of Chancery of filing bills to impeach decrees on the ground of fraud, to suspend the operation of decrees, and to carry decrees into operation, and can have no application to the setting aside of an order of the Surrogate Court made on the passing of the accounts of an executor, but that the Surrogate Judge, acting as the Surrogate Court, has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of the party who has obtained it, and also to set aside

or vary an order which he has made by mistake, though not to correct errors which he has made in the judicial determination of any question upon which he has actually passed.

Third Party Procedure.]—Reasons which led a Divisional Court in Mahoney v. Canada Foundry Co., 8 O. W. R. 651, to set aside an ex parte order granting leave to serve a third party notice, were that the case was entered for trial and the plaintiff was ready to go on, that the defendants set up as a defence that the accident in respect of which the action was brought was due to the subsidence of the track on which the derrick causing it was working, and that this track was outside their control, and, if so, the case was not one for third party proceedings; and that there were other actions pending and claims made founded on the same happening, and the third parties ought not to be subjected to having the damages assessed piecemeal.

Vendor and Purchaser.]—All the terms of an agreement for sale of land being set forth in an "option" signed by the vendor, Mabee, J., decided in Carrick v. McCutcheon, 8 O. W. R. 749, that the fact that the parties may have arranged that certain deferred payments should be secured by a mortgage, if the vendor gave a deed, had not the effect of making the agreement (which did not contain these terms) non-enforceable by reason of its not satisfying the requirements of the Statute of Frauds. A mistake of the vendor in supposing that he was the owner in fee, whereas he had only a life estate, would not relieve him from the obligation to carry out his contract of sale.——Points decided by MacMahon, J., in Carton v. Wilson, 8 O. W. R. 781, were that an option for the purchase of lands, where no consideration moved to the person making the offer therefor, may be withdrawn, although containing the words "to be open and irrevocable for 6 months," at any time before acceptance; and that a notice of withdrawal delivered to the secretary of an incorporated company was properly served and

a good notice though addressed to the secretary personally, especially as the latter at the time made use of expressions indicating that he considered it a notice to the company.——In Gunn v. Turner, 8 O. W. R. 796, an action for specific performance of an agreement for the purchase of certain lands, a Divisional Court held that no evidence being adduced to displace the recital in a deed that the grantee in 1864 was administrator of his father's estate, under s. 3 of R. S. O. 1897 c. 134, it was sufficient proof of that fact.

Venue.]—An appeal by the defendants in Bell v. Goodison Thresher Co. from the order of the Master in Chambers, 8 O. W. R. 567, noted 26 C. L. T. 809, was dismissed by Britton, J.: 8 O. W. R. 618.

Will.]—A deed of land, in fee simple, from a devisee of an interest in land devised "to her, her heirs and assigns, absolutely and forever . . . to be disposed of by her as she may deem most fit and proper for the best interest of my brothers and sisters, and enjoining my said mother to pay to my two sisters the legacies binding on me by the aforesaid mentioned will of my deceased father," to a sister of the testator, expressed to be made in consideration of $1 and natural love and affection, without any reference to the will, was held by a Divisional Court in Pettypiece v. Turley, 8 O. W. R. 617, affirming the judgment of Falconbridge, C.J., to be intended by the grantor to operate as an execution of the trust and to be a good execution thereof.——A devise of lands with the addition of the words "to have and to hold to each of them for and during their natural life respectively, and if they should marry after their and such of their decease, to have and hold to their surviving wife respectively, and on the demise of their and each of their wives, to have and to hold to their children respectively, and their heirs forever," was held by Falconbridge, C.J., in Re Sharon and Stuart, 8 O. W. R. 625, not to constitute a case for the application of the rule in Wild's case, 6 Rep. 17, as the rule can apply only where the gift to both the

parent and the children is immediate, nor does the rule in Shelley's case apply (see Chandler v. Gibson, 2 O. L. R. 442). It was decided, therefore, that the devise in question did not create estates tail subject to the life estates of the wives; and that where a devisee was unmarried at the date of the will a second wife would be entitled to a life estate under the will; the testator, having referred to a future wife, meant any future wife.——The blending together in a residuary gift of real and personal property was held by Meredith, C.J., in Re Gamble, 8 O. W. R. 797, not to be an indication of a contrary intention, within s. 27 of the Wills Act, so that the devise of the real estate was to the devisees as tenants in common and the bequest of the personal property to them jointly, and therefore, as to so much of the residue as was real estate, the share of a devisee who died in the testator's lifetime, was undisposed of, while, as to the personalty, the other joint legatee would take by right of survivorship.——Several questions were decided by Falconbridge, C.J., upon the construction of the will in question in Re Miles, 8 O. W. R. 817. The word "mentioned" in a residuary clause directing that the residue should be divided among all persons mentioned in the will, was held not to be restricted to those mentioned as beneficiaries, but to have its plain everyday meaning and to include the executors. "Parties who shall be living at the time of the winding-up of my estate" was held inapplicable to corporations, but not to the "poor of Tilsonburg," and this gift was not void for uncertainty. "Winding-up of my estate" refers to the expiration of the one year which is allowed by law, and the representatives of the legatees who were alive at the expiration of the year, were held entitled to share under the residuary clause.

Writ of Summons.]—The order of Mabee, J., in Anderson v. Nobels Explosive Co., 8 O. W. R. 558, noted 26 C. L. T. 810, was affirmed by a Divisional Court: 8 O. W. R. 644.

CASES FROM WESTERN CANADA.*

Attachment of Debts.]—The decision of Duff, J., in Belyea v. Williams (B.C.), 4 W. L. R. 457, was to the effect that a debt, the subject matter of which is not within the jurisdiction of the County Court, cannot be reached by attachment proceedings in such Court.

Bailment.]—In Consentino v. Dominion Express Co. (Man.), 4 W. L. R. 498, the new Court of Appeal for Manitoba had before it a very interesting question as to the liability of the defendants for the money contained in a registered letter which was received by them and lost or stolen from their office. The judgment of Richards, J., 3 W. L. R. 391, noted 26 C. L. T. 423, was in favour of the plaintiff; but the majority of the Court of Appeal decided in favour of the defendants. A registered dead letter addressed by the post office authorities to the defendants was, in the ordinary course, delivered to the clerk of the defendants who was the proper person to receive their registered letters. He thought it belonged to the defendants, and placed it where their registered letters are placed. The letter disappeared. The letter in fact contained a returned registered letter, the property of the plaintiff; it did not in any way belong to the defendants, nor was it in any respect connected with their business. Howell, C.J.A., was of opinion that the defendants owed the plaintiff no duty with reference to the letter; they thought the letter was theirs, and they had a right to do with their own as they chose; they were not acting for the public or holding themselves out in any way as acting for the public; and no principle of law could be invoked to raise a duty from the defendants to the plaintiff. Phippen, J.A., was of the same opinion. "The contingency," he said, "of persons causing large sums of money to come into their

* Short notes of the most important cases in Volume IV. of the Western Law Reporter, Nos. 5 and 6, pp. 369 to 536, inclusive.

clerks' possession on other than the defendants' business was not a factor which the defendants were bound to contemplate when selecting their agents and determining their fitness for the positions they were appointed to fill." Perdue, J.A., the third member of the Court, dissented, agreeing with the trial Judge that the defendants were involuntary gratuitous bailees, and as such liable for gross negligence.

Bankruptcy and Insolvency.]—An important point was decided by the Court of Appeal in Bank of Ottawa v. Newton (Man.), 4 W. L. R. 508, where it was held that a secured creditor having valued his security and proved for the balance of his claim, as required by the Assignments Act, the duty was cast upon the assignee that he should with due diligence and within a reasonable time, having regard to the circumstances, elect whether to allow the creditor to retain his securities, or take them over at an advance of 10 per cent. upon such valuation, and that, in case of his default, the creditor might retain the securities and recover from the assignee dividends upon the balance of his claim as proved, to an amount that with the net amount realized on such securities should not exceed 10 per cent. of his claim.

Certiorari.]—It was contended for the Crown in Ex. p. Harris (N. W. T.), 4 W. L. R. 530, that the summons and affidavit issued in certain certiorari proceedings were wrongly intituled since the name of the informant did not appear, but Wetmore, J., decided that it could not be considered that an application for certiorari was made against the informant, being in fact made against the justices, and that therefore Rule 38 of the Crown Practice Rules did not require the insertion in the title of the proceedings of the name of the informant.

Company.]—In dismissing a County Court appeal in Macdonald v. Drake (Man.), 4 W. L. R. 434, the Court of Appeal decided that persons who have been elected and acted as directors of a company, are, though not qualified by reason

of the provisions of s. 27 of the Manitoba Joint Stock Companies Act, to hold the office, liable for the wages of employees under s. 33 of the Act, and that the latter section is not penal in its nature, its effect being simply to withhold from directors the freedom which the statute would otherwise give them from personal liability for the debts of the company.

Consent Judgment.]—Upon the trial of Turner v. Van Meter (N.W.T.), 4 W. L. R. 392, certain questions were decided by the jury, other questions being left to be decided by the trial Judge. Without, apparently, his having made any disposition of such issues, an order disposing of all the issues was settled upon and taken out. It was marked approved and signed by counsel for both parties. The full Court deemed this order to really amount to a consent judgment to carry out the findings of the jury within Rule 500 of the Judicature Ordinance, and, in the absence of the permission required by that Rule, dismissed an appeal therefrom. See, however, McMaster v. Radford, 16 P. R. 20.

Constitutional Law.]—A case which has excited a good deal of public attention, Re Prince Albert City Provincial Election, Strachan v. Lamont (N.W.T.), is reported in 4 W.L.R. 411, upon appeal from the order of Prendergast, J., 3 W. L. R. 571, noted 26 C. L. T. 595, dismisisng a petition against the election of the respondent as member for Prince Albert City in the Legislative Assembly of Saskatchewan. The decision of Prendergast, J., was that the Controverted Elections Ordinance of the North-West Territories was not in force in the new province of Saskatchewan, and this was upheld by a bare majority of the five Judges who heard the appeal.

Costs.]—The plaintiff in Taylor v. Town of Portage La Prairie (Man.), 4 W. L. R. 404, though succeeding in his action for damages for the loss of his horse injured as a result of the unsafe condition of one of the streets of the town, was deprived by Macdonald, J., of the costs of the action,

because of his misleading statements to officers of the defendant corporation, but for which, in the opinion of the Court, the claim might not have been contested.

Criminal Procedure.]—The decision of Harvey, J., in Rex v. Pisoni, Rex v. Taylor (N.W.T.), 4 W. L. R. 527, was that, notwithstanding clause v. of s. 782 of the Criminal Code, there is no appeal, as from summary convictions under part LVIII., from convictions for offences under clauses (a) and (f) respectively of s. 783, since these offences were triable in the Territories summarily by virtue of clause iv. before the passing of clause v., and the appeal is given only in cases where such offences are tried by virtue of clause v.——Points decided by Stuart, J., in Rex v. Taylor (N.W.T.), 4 W. L. R. 532, were that an individual charged with being unlawfully at large within s. 159 of the Code has no right to elect whether he will be tried by a jury; that justices of the peace, having once sent in a conviction and other documents pursuant to s. 801, have power to file a different and amended conviction, as long as the first conviction has not meanwhile been attacked, and such amended conviction can be given in evidence on a subsequent criminal trial wherein it becomes necessary to prove the conviction; and that a person released on bail, on an appeal being taken which did not lie, is, quite apart from any refusal to return to custody, guilty of an offence under s. 159.

Discovery.]—That an officer of a corporation upon being examined for discovery will not be allowed to read from or refer to a memorandum purporting to contain the information asked for, but prepared by others, was decided by Mathers, J., in Fraser v. Canadian Pacific R. W. Co. (Man.). 4 W. L. R. 525. He must sufficiently post himself, by reference to documents, if necessary, and any such are in existence, and, if he cannot rely upon his memory, he may refer to a memorandum prepared by himself, or to the accuracy of which he can pledge his oath.

Dying Declaration.]—The position and severity of the wound from which deceased died within 24 hours, his statements to those about him, and the views of the two medical men in attendance, made known to him, were such as, in the opinion of the full Court, in Rex v. Magyar (N.W.T.), 4 W. L. R. 396, as to preclude, in his mind, any possible hope of recovery, and, therefore, to warrant the reception in evidence, against the defendant, of his dying declaration. It was decided that this declaration, though not in the actual words of the deceased, but the substance of questions asked him and his answers thereto, having been accepted and signed by him when he knew what he was doing, was, notwitstanding Regina v. Mitchell, 17 Cox C. C. 503, sufficient, and that the declaration was not offered as a deposition, but simply as a statement, and did not require to be taken in presence of the accused: The King v. Louie, 7 Can. Crim. Cas. 347.

Election Frauds.]—In Rex v. Sinclair (N.W.T.), 4 W. L. R. 374, the full Court decided that charges of conspiracy (a) to defraud a candidate at an election from being returned as a member of the Legislative Assembly, (b) to defraud the electors by illegally obtaining the return of another person, and (c) to defraud the public by procuring the return of the latter, did not disclose any offence, because the acts charged were not fraudulent within the meaning of s. 394 of the Criminal Code, which applies only to conspiracies to deprive a person of his property or right of property —something of a commercial or tangible character—and did not constitute indictable offences either by statute or at common law, within the meaning of s. 527. It was also decided that the particulars furnished could not be considered as part of the charge for the purpose of making out a case under s. 503. The Court was of opinion, also, that the first two counts were bad, inasmuch as it was not alleged that the defendant conspired "by deceit or falsehood or other fraudulent means," and the third because

the public had no rights in the matter out of which they could have been defrauded.——The Court of Appeal in Rex v. Duggan (Man.), 4 W. L. R. 481, for reasons set out in their respective judgments, decided on a case reserved upon an indictment and trial of a returning officer at a Dominion Election for fraudulently altering a voters' list, that the trial Judge should not have withdrawn the case from the jury, because the list in question was a voters' list within the meaning of s. 503 of the Criminal Code, from the time, at least, of its selection by the defendant for use by his deputy returning officer, so that, having delivered such list with the alterations already in it, to such deputy returning officer, there was prima facie evidence of the commission of an offence under the section named.

Equitable Execution.]—An appeal in McDougall v. Gagnon (Man.), 4 W. L. R. 425, from the decision of Richards, J., 3 W.L.R. 387, noted 26 C.L.T. 426, was allowed by the full Court, and judgment entered for the defendant G., because, independently of the fact that no administrator had been appointed to his wife's estate, which was in itself fatal to the plaintiff's case, lands as defined by s. 2 (f) of the Judgments Act, R. S. M. 1902 c. 91, include "a present existing interest in the land to which the judgment debtor is entitled, or an interest now existing, which will, or may, on the happening of certain events, become an actual vested and beneficial interest, such an interest in fact as he could now convey or charge by deed," but not "an interest which may come to him as real estate, or may come to him as money, it all depending upon the actions of the administrator, and the unknown exigencies of the administration, whether such interest will be in the form of money or in that of land," and therefore the interest in question was not affected by the certificate of judgment registered.

Evidence.]—A copy of an agreement respecting the lands in question in Gudgel v. Case (N.W.T.), 4 W. L. R.

462, certified a true copy by the Superintendent General of Indian affairs, was held by Wetmore, J., not to be receivable in evidence, under the Canada Evidence Act, or s. 93 of the Dominion Lands Act, or s. 130 of the Indian Act, both because it was not certified to be a copy of any document or paper deposited in the Dominion Lands Office or in the Department of Indian Affairs, and because the original instrument would not be receivable in evidence unless its execution were proved, which had not been done. A statement of what a party to the action conceived to be the effect of certain transfers and assignments was also held not admissible.

Forged Cheque.]—In Union Bank of Canada v. Dominion Bank (Man.), 4 W. L. R. 407, the facts were that a cheque of the Manitoba Government on the plaintiffs had been raised to $1,000, and the name of another payee substituted for the company in whose favour it was drawn. It was presented to the plaintiffs and payment refused for want of identification, and then presented to the defendants, who refused payment until there was identification of the payee or it should be honoured by the plaintiffs, the defendants, however, making in the meantime an advance of $25. The cheque was paid by the plaintiffs, and thereupon the defendants paid an additional $800. The plaintiffs' action was to recover the money paid. Dubuc, C.J., considered Rex v. Bank of Montreal, 11 O. L. R. 595, 7 O. W. R. 638, very much in point, and accordingly held that the stamp of the defendants on the back of the cheque was not an indorsement, and that the defendants were entitled to succeed.

Guarantee.]—The crucial point in Fraser v. Heaslip (Man.), 4 W. L. R. 520, was whether the arrangement made by the defendant with the plaintiff was in the nature of a guarantee of his son's indebtedness to the plaintiff, thus coming within the 4th section of the Statute of Frauds, or of a contract to indemnify the plaintiff against loss on

goods sold to the son. On the evidence, Mathers, J., decided that it was of the first mentioned character, and, in the absence of any promise in writing, dismissed the action.

Highway.]—The circumstances that the street foreman of the defendant corporation thought the place where the accident in respect of which the plaintiff in Taylor v. Town of Portage La Prairie (Man.), 4 W. L. R. 404, sued, occurred, dangerous, and to prevent it being used by the public placed a plank across it, which, however, remained only a short time, and that, prior to the accident, the condition of the street had been discussed by the waterworks committee, were held by Macdonald, J., to establish the knowledge of such unsafe condition on the part of such defendants so as to entitle the plaintiff to recover.

Land Titles Act.]—The full Court decided in Re Tucker and Armour (N.W.T.), 4 W. L. R. 394, that the simple act of taking possession on the part of the lessor by his bailiff was not a legal proceeding within the meaning of s. 70 of the Land Titles Act, 1894, so as to empower the registrar to cancel a lease. The rights of the parties must have been first determined by an action or legal proceeding.

Municipal Corporations.]—Macdonald, J., in Re Devitt and City of Winnipeg (Man.), 4 W. L. R. 369, decided that an appointment of an arbitrator signed by the mayor only was not sufficient, since the city charter provided that such appointment should be signed in the same manner as a by-law, which, by another section, was required to be under seal and signed by the mayor or acting mayor and the clerk or acting clerk. The arbitration proceedings adopted by the council were held to be irregular and unauthorized, for, though s. 783 of the charter empowered the city to expropriate lands for the purpose of a market, no procedure was provided therefor.

Parties.]—The point decided by Mathers, J., in Watt v. Popple (Man.), 4 W. L. R. 519, was that the consent re-

quired by Rule 242 (b) as a condition of adding a party plaintiff, must be signed by the party to be added under his own hand. A consent signed by an agent is not sufficient.

Railway.]—Though the full Court considered that the plaintiff in Hanson v Canadian Pacific R. W. Co. (N.W.T.), 4 W. L. R. 385, was heedless and reckless in approaching on a run the defendants' track by a platform, provided for the use of the public, which sloped down to and crossed a track (upon the level thereof) upon which he well knew that approaching cars were obscured by the station building yet it was decided that, if his statement that he saw the car which caused the injury sued for in time to save himself, but was unable to do so by reason of the slope, were believed, the case was not one for the application of the "stop, look, and listen" rule. The fact that the place was a dangerous one was held to impose upon the defendants the duty of taking precautions, such as blowing the whistle and ringing the bell. The judgment in favour of the plaintiff was set aside and a new trial ordered because of error of the trial Judge in directing the jury that this platform was a public highway within the meaning of s. 2 (i) of the Railway Act, 1903.——The important question of the liability of a railway company for cattle killed or injured upon the track, under the amended section of the Dominion Railway Act as it appears in the consolidation of 1903, s. 199, reached the Court of Appeal in Carruthers v. Canadian Pacific R. W. Co. (Man.), 4 W. L. R. 441, upon appeal from the decision of Richards, J., 3 W. L. R. 455, noted 26 C. L. T. 516. Four horses, the property of plaintiff, strayed from a fenced field through an opening into a highway, thence through an opening upon a neighbour's land, and thence through an opening in the defendant's fence between the right of way and the neighbour's land, they got upon the track and were killed. Howell, C.J.A., "with

some doubt and hesitation," held "that when cattle are at large or otherwise on a highway, and escape from there to a field adjoining the railway, and from that field (although they are there without the leave of the owner) wander upon the railway at a point where the railway company are required to fence, under s. 199, and are killed or injured by a train, the company are liable." Perdue, J..A, was of the same opinion. "The statute of 1890," he says, "clearly shewed an intention to extend protection to others than adjoining owners in cases which fell within that statute. Is it too much to say that the statute of 1903 was intended to go further and make the obligation a general one in favour of all persons, subject only to the exceptions specifically mentioned in the Act?" Phippen, J.A., the remaining member of the Court as composed for the hearing of the appeal, dissented, saying that he could not find in s. 199 any such plain intention to alter the law as would justify him in supporting the trial judgment.

Security for Costs.]—Though the plaintiff in Clark v. Fawcett (N.W.T.), 4 W. L. R. 529, who was resident out of the jurisdiction, had an interest in lands within the jurisdiction, under an agreement of purchase, which he asserted to be worth $4,500, Wetmore, J., ordered security for costs, because, while possibly such interest was seizable under execution, it was of an unsatisfactory character as security, being liable by forfeiture or otherwise to disappear at any moment.

Trade Union.]—Mitchell v. Woods (B.C.), 4 W. L. R. 371, was an action against certain officers of the Vancouver Employers' Association for loss sustained by the plaintiff, one of the employees of the Vancouver Engineering Works, who had gone on strike, by reason of his being prevented by the action of the defendants, representing the association, from obtaining employment at his trade. The jury found that the defendants had not injured the plaintiff in

his trade by preventing him from obtaining employment in that trade from employers other than the Engineering Works, but they also found that he was, by the acts of the defendants, pursuant to the combination of the association who were lending their influence and assistance to the Engineering Works in the dispute in question, prevented from obtaining such employment. Applying the reasoning of Lord Lindley in South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. at p. 252, and Yorkshire Miners' Association v. Howden, ib. at p. 279, Duff, J., determined the case in favour of the defendants.

Vendor and Purchaser.]—Several causes contributed to the non-success of the plaintiff in Trick v. Canniff (Man.), 4 W. L. R. 515. In the first place, Mathers, J., considered that the correspondence relied upon, which included a letter saying that the defendant's husband wanted $2,000 for the property in question, and a letter in which the plaintiff said he would accept this offer, at the same time expressing a hope that easy terms of payment would be granted and suggesting $500 down and $500 a year, did not establish a concluded agreement. Then, though the property was in the name of the defendant, the letters written by her were in the name of her husband, since deceased, and were written after consultation with him and by his authority, and the case made out in the statement of claim was against him, and she was neither sued as, nor was she in fact, his personal representative.——The plaintiff in Gudgel v. Case (N.W.T.), 4 W. L. R. 462, sought a declaration that certain contracts had not been forfeited, or in the alternative the return of a deposit paid by him. Attachment proceedings were taken in an Iowa Court after such contracts had been entered into, by which it was sought by third parties to obtain a portion of the purchase money payable by the plaintiff, as being a debt due to the defendant Porter. From the many agreements between the defendants, Wetmore, J., deduced that, assuming Porter to be the cestui

que trust of the defendant Case, he was only at the time of the service of the garnishee notice interested in an undivided one-half of what was payable by the plaintiff, and, without deciding whether the beneficiary interest of a cestui que trust in trust money is attachable in Iowa, held that such service could not bind the other half, and that the plaintiff had no excuse for not paying one-half of the instalment the non-payment of which was the ground for the cancellation of the contracts mentioned, and that the right to cancel was not affected by the circumstance that after notice of cancellation the other half interest became vested in Porter. Case, with whom the plaintiff contracted, was held to be the proper person to give the notice, and such notice was held to be good though the whole amount was demanded without deducting Porter's interest. Having regard to the contracts themselves and the circumstances, the plaintiff was held not entitled to recover the deposit paid by him.

Will.]—By the will in question in Re Biden (N.W.T.), 4 W. L. R. 477, a devise of certain lands was made which turned out to be void by reason of the devisee being a witness to the will, wherefore, by reason of s. 3 of the Land Titles Act, 1894, the question arose whether the subject matter of such devise should go to the next of kin or should be treated as personalty and go to the residuary legatees. Wetmore, J., decided that the latter was the true construction to be placed upon the will. A disposition of residue after payment of debts, accompanied by a direction that a parcel of land shall be sold to help pay the testator's debts, is not an intimation that he intended his debts to be paid out of such parcel, but only that the proceeds of the same should be used to help to pay debts.

DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.*

Admiralty Practice.]—By the Admiralty Act, 1891, the province of Quebec forms a single admiralty judicial district called the Quebec admiralty district. Section 13 provides that when a suit is instituted in any registry, another suit resulting from the same facts and between the same parties shall not be taken in another admiralty registry. By the amending Act of 1900 the Governor-General in council may divide the territory of an admiralty district and establish different registries in it. There are two registries in the province of Quebec, one at Quebec and one at Montreal. A collision having occurred between the S. S. "Gaspesian" and "Elevator No. 7," the owners of the former began a suit at Quebec against the latter therefor, and subsequently the latter began a cross-action at Montreal. The local Judge at Montreal refused a motion to consolidate, and fixed a date for the trial of the Montreal action at Montreal. The plaintiffs in the Quebec action (Bouchard v. "Elevator No. 7" (Que.), 2 E. L. R. 125), then applied to the local Judge at Quebec to have a date fixed for the trial of that action at Quebec, but the defendants asked that the trial should be at Montreal on the date fixed for the trial of the cross-action. The amending Act of 1900 provides that a second suit between the same parties and for the same cause cannot be taken in another registry when a first action is pending before the original registry. In these perplexing circumstances, the local Judge at Quebec saw nothing for it but to make an order for trial at Quebec of the action there begun, saying that it would not be just to force the plaintiffs in that action to proceed elsewhere than at Quebec.

* Short notes of the most important cases in Volume II. of the Eastern Law Reporter, No. 4, pp. 109 to 148, inclusive.

Appeal to Privy Council.]—It is held in New Brunswick that the order or judgment of the Judicial Committee of the Privy Council upon an appeal from the Supreme Court of New Brunswick should be entered as a judgment of the latter, and that a motion to the Court to have it so entered is necessary and proper: Robertson v. Fairweather (N.B.), 2 E. L. R. 134.

Assessment and Taxes.]—In Carleton Woollen Co. v. Town of Woodstock (N.B.), 2 E. L. R. 137, the full Court affirmed the decree of the Judge in Equity, 3 N. B. Eq. R. 138, allowing a demurrer to the plaintiffs' bill, upon the ground that the exemption from taxes authorized by a resolution of the defendants' council, which the plaintiffs sought to enforce, was not warranted by s. 1 of 36 V. c. 81 (N.B.), as it unfairly discriminated between companies establishing woollen mills and private individuals engaging in the same business, giving the exemption to one and not to the other.

Canada Temperance Act.]—Upon a motion for the discharge of the defendant, who had been convicted of a third offence against the Canada Temperance Act, it was contended that the conviction was bad because the first and second convictions as recited in the third conviction did not shew affirmatively that the informations were respectively laid within three months after the offences of which the defendant was convicted: Rex v. Clark (N.S.), 2 E. L. R. 127. The full Court overruled this objection on the authority of Wray v. Toke, 12 Q. B. 492, which they followed in preference to Regina v. Adams, 24 N. S. R. 559. It was also contended that the defendant had not sufficient time allowed him after an amendment made at the trial. The information originally sworn alleged an offence between the 24th September and the 15th October, 1906. The "15th" was amended to the "16th," and the information resworn. The affidavits shewed that the defendant was expressly informed of the amendment, and declared himself ready

for trial on the amended charge, and that he pleaded to it, and was given the fullest opportunity to examine witnesses and make his defence. The Court referred to s. 116 of the Canada Temperance Act, and held that the defendant had waived his right to an adjournment.

Chose in Action.]—That a debt or chose in action cannot be validly assigned by an incorporated company by resolution of the board of directors without more, under C. S. N. B. 1903 c. 111, s. 155, enacting that "every debt and any chose in action arising out of contract shall be assignable at law by any form of writing which contains apt words in that behalf," was decided by the full Court upon demurrer in Lynch v. William Richards & Co. (N.B.), 2 E. L. R. 141.

Jury.]—Although the opinion of the Court was that the verdict of the jury in favour of the defendant in Nadeau v. Theriault (N.B.), 2 E. L. R. 135, was not affected by the treating of a juror to drink by the defendant's attorney during the progress of the trial, a new trial was granted, the Court "adhering rigidly to the rule which forbids any communication between the parties or their attorneys and the jury which might possibly tend to influence them improperly."

Municipal Corporations.]—Hart v. City of Halifax (N.S.), 1 E. L. R. 118, was an action by a ratepayer for a declaration that payments made out of the city treasury to the mayor and city engineer for their expenses as delegates to a convention of Canadian municipalities were illegal, and for repayment of the amounts into the treasury by the mayor and engineer, who were made defendants. The city council had refused to allow the plaintiff to sue in the name of the corporation. Meagher, J., who tried the action, held that the payments were illegal, and that the city corporation could recover them from the payees, and in an action by the corporation the Attorney-General would

not be a necessary or proper party; but that the plaintiff could not maintain the action, even with the corporation before the Court as defendants, without joining the Attorney-General—in this following the English rule rather than that to be deduced from Ontario and United States decisions. The action was, therefore, dismissed.

Parliamentary Elections.]—Another question of procedure arose before Meagher, J., in the Halifax Election Case, Hetherington v. Roche (N.S.), 2 E. L. R. 109. Before the trial of the controverted election petition that learned Judge had made an order in Chambers for the examination before himself of the respondent for discovery. The examination had not taken place, and the trial had been begun before other Judges assigned for the purpose, and was to be proceeded with. The petitioner, however, applied to Meagher, J., during an adjournment of the trial, for an appointment for the examination, which he declined to grant, upon the ground that the Judges assigned for the trial had exclusive jurisdiction.

Preference.]—In Edgett v. Steeves (N.B.), 2 E. L. R. 131, Barker, J., upon a motion to continue an interlocutory injunction, held that under s.-s. 3 of s. 2 of C. S. N. B. c. 141, relating to preferences by insolvent persons, the presumption of an unjust preference which is to be made where an action impeaching it is brought within sixty days, is a rebuttable presumption, but is not to be rebutted by evidence of pressure, agreeing with Webster v. Crickmore, 25 A. R. 97, and Beattie v. Wenger, ib. 72.

EDITORIAL REVIEW.

Privy Council Appeals.

A letter to the Registrar of the Court of Appeal for Ontario from the Registrar of the Privy Council, dated from Downing street, 5th January, announces that their Lordships of the Judicial Committee are prepared to accept the records as printed for the Canadian Courts, with the necessary additions bringing the case up to date, as the records in appeals in the Privy Council, if the former Courts adopt the form of printing now prescribed for Privy Council records.

This is a concession which ought to bring about a large saving in expense.

The Christopher Robinson Memorial Fund.

The proposal for a memorial to the late Christopher Robinson has, we are told, met with a ready response from members of the Ontario Bar. More than $1,600 has been received by the treasurer of the fund, Mr. Angus MacMurchy, in $5 subscriptions, and larger sums have been proferred but not yet accepted. When the fund reaches $2,000, a meeting of the subscribers will be held. The memorial is to take the form of a brass tablet in Osgoode Hall and a law scholarship or scholarships in connection with the Law Society.

Change of Name.

Can a man change his Christian name? The question is raised by a little text-book, "On the Law Concerning Names and Changes of Names," which has just been written by Mr. A. C. Fox-Davies and Mr. P. W. P. Carlyon-Britton. Mr. Fox-Davies is so eminent an authority in these matters that it is worth while to examine the proposition which he

lays down, that "there is no way known to the law by which a man or woman can change a name which has been given in baptism:" p. 4. The Christian name is received in baptism "by a solemn act inseparably connected with his religion:" Rex v. Inhabitants of Billinghurst, 3 M. & S. at p. 254. The common law, the learned authors justly state, "recognizes the inviolable character of that religious ceremony, and its unalterable effect in conferring a Christian name, because it provides neither through the exercise of the King's prerogative nor by any other operation of law for any alteration." But it is too much to state that it does not "even contemplate the possibility of a change of Christian name," for the common law recognized the change made at confirmation. "If a man be baptized by the name of Thomas, and after his confirmation by the bishop he is named John, he may purchase by the name of his confirmation:" Co. Litt. 3. For which dictum the leading authority is the case of Sir Francis Gawdy, Chief Justice of the Common Pleas in the time of Henry VIII.: 2 Rolle Abr. 135. At that time, however, the form of service of confirmation required the bishop to pronounce the name. But the service was altered in that respect by the prayer-book of 1662. Doubt was raised as to whether the bishop could still exercise this power (see Burn's Ecclesiastical Law, ii., 10, and Johnson's English Canons, 1281, 3); but, upon the advice of Sir Edward Northey and Lord Chief Justice Holt, Archbishop Wake, when Bishop of London, changed the name of a lad in 1707. The precedent has been followed on several occasions, notably as recently as 1886 by the late Bishope Ryle of Liverpool: 7th Ser. Notes and Queries, vol. 2, p. 77.

Bearing upon this point may be mentioned the petition of the Rev. Henry Johnston to the Court of Session in 1899: Court of Session Cases, 2 F. 75. He asked for authority to assume the name of Lindsay. Lord Adam, in delivering the judgment of the Court, said: "Any person in Scotland may, without the authority of the Court, call himself what he

pleases, and, accordingly, when a petition for such a purpose is received we are in use to dismiss it as unnecessary, unless sufficient reason is shewn for the application." As the Bishop of Rochester had refused to ordain the petitioner by any other name than was contained in his baptismal certificate, the Court granted the prayer of the petition; but it is not to be supposed that they intended to confer an additional Christian name, as may be shewn by a reference to the catena of cases upon which the Court founded their judgment. In practice, however, the signature of the petitioner is "H. L. Johnston," as if "L." were the initial of a Christian name. As the Court would not change a Christian name which had really been given by a religious ceremony, so it is extremely doubtful whether Parliament would consent to interfere, even though, as Mr. Fox-Davies says, "an Act of Parliament can do anything in this country." In any case, it is clear that the practice of dropping a Christian name upon receiving the honour of knighthood is unsound in law. A mere declaration to that effect in the papers cannot deprive the owner of his name, and some day serious objection might be taken to the validity of acts done in the reduced name. Of course, where baptism does not take place, the name cannot properly be described as a Christian name, and its status, so to speak, is incapable of definition. (London Law Times.)

More Enduring than Bronze.

In the great case of the State of Kansas against the State of Colorado, in which the United States has intervened as a party to determine the contested rights of the respective States in the use of the waters of the Arkansas river, a brief by David C. Beaman, of Denver, in support of the right of the people of Colorado to use the waters of the river for irrigation, even to the extent of exhausting the river to the detriment of the people of Kansas, ends with a glowing tribute to the beneficence of irrigation, and quotes from an unnamed author a pertinent passage of dignified and majestic elo-

quence, which all our readers will enjoy, and some of them may recognize: "Although the tomb of Moses is unknown, the traveller of to-day slakes his thirst at the well of Jacob. The gorgeous palaces of the wisest and wealthiest of monarchs, with their cedar and gold and ivory, and even the great temple of Jerusalem, hallowed by the visible glory of the Deity Himself, are gone; but Solomon's reservoirs are as perfect as ever. Of the magnificent and costly architecture of the Holy City, not one stone is left upon another, but the pool of Bethesda commands the pilgrim's reverence at the present day. The columns of Persepolis are mouldering into dust, but its cistern and aqueduct remain to challenge our admiration. The golden house of Nero is a mass of ruins, but the Aqua Claudia still pours into the city of Rome its limpid stream. The Temple of the Sun, at Tadmor in the wilderness, has fallen, but its fountain sparkles in the rays of the morning as when thousands of worshippers thronged the lofty colonnades. And if any work of this generation shall rise over the deep ocean of time, we may well believe that it will be neither a palace nor a temple, but some vast aqueduct or reservoir; and if any name shall hereafter flash brightest through the mist of antiquity, it will probably be that of the man who in his day sought the happiness of his fellow men, and linked his memory to some such work of national utility or benevolence." (Case and Comment.)

Beats the Dutch.

A Montana lawyer gives us the following copy of a power of attorney sent him in the matter of an estate which was being administered. It ingrafts on the English language a somewhat complicated, but perfectly orderly, construction in the heavily loaded clauses which describe the respective brothers referred to. German compounds are weak in comparison. It runs as follows: "We, the undersigned, in Sweden residing, legal heirs to our in Livingston, Park County, State of Montana, United States of North America, before this residing, now deceased, brother, Edward N. S———, do here-

by authorize our in Lyndne, Watcom County, State of Washington, United States of North America, residing brother, C. S———, to in our place transact all business, sign and seal all needy instruments, receive and give receipts to our legal shares, and in all be our representative in above named heirship." (Case and Comment.)

With Apologies to Mr. Kipling.

"What is that awful racket?"
Says Files-on-Parade.
"It's counsel's opening argument,"
The Colour Sergeant said.
"Who has to hear the bally stuff?"
Says Files-on-Parade.
"The Chief and his two hired men,"
The Colour Sergeant said:
"For he doesn't know his law,
And he misrepresents his facts,
And his argument's so rotten
You can see through all the cracks;
And I reckon that he'll get it where the chicken got the axe,
When the Court delivers judgment in the morning."

The Companion-piece.

"Who are those talkative old men?"
Said the old forensic Shade.
"They're Judges hearing argument,"
The Junior Counsel said.
"Why do they interrupt so much?"
Said the old forensic Shade.
"They're helping counsel state his case,"
The Junior Counsel said.
"They've not heard all the facts, and they never read the law,
But the style of cause enables them, to inferences draw;
And the counsel bears it meekly, though it gets him on the raw,
And he'll take the case up higher in the morning."

Recent American Decisions.

Attachment of Debts.—A verdict upon which no judgment has been entered is held, in Cappelli v. Wood (R.I.), 4 L. R. A. (N.S.) 624, not to be subject to garnishment.

Bank Directors.—The liability of directors of a bank for default or negligence of the cashier is held, in Mason v. Moore (Ohio), 4 L. R. A. (N.S.) 597, to be enforceable if they have failed to exercise reasonable supervision.

Carriers.—The right to stipulate against liability for negligence in consideration of reduced fare is denied in Pittsburgh, C. C. & St. L. R. Co. v. Higgs (Ind.), 4 L. R. A. (N.S.) 1081.

Injury to a passenger by a dog on a street car is held, in Westcott v. Seattle, R. & S. R. Co. (Wash.), 4 L. R. A. (N.S.) 947, to make the carrier liable.

The insanity of a locomotive engineer, which causes the wreck of a car, is held, in Central of Ga. R. Co. v. Hall (Ga.), 4 L. R. A. (N.S.) 898, not to be an act of God which will excuse the carrier.

Damages.—Punitive damages for malicious assault and battery are held, in Hanna v. Sweeney (Conn.), 4 L. R. A. (N.S.) 907, not to be allowable beyond the expenses of litigation in the suit, less taxable costs.

Seduction is held, in Wrynn v. Downey (R.I.), 4 L. R. A. (N.S.) 615, not to be properly considered in aggravation of damages for breach of promise of marriage.

Deed.—A grantor delivering a deed in escrow, to be delivered after his death to the grantee, is denied, in Grilley v. Atkins (Con.), 4 L. R. A. (N.S.) 816, the right to revoke it.

Defamation.—An oral charge of insolvency, against a merchant, is held, in Dallavo v. Snider (Mich.), 4 L. R. A. (N.S.) 973, not to be actionable per se, unless the words were actually spoken in relation to his business.

To accuse one of being a member of a labour union and a labour agitator is held, in Wabash R. Co. v. Young (Ind.), 4 L. R. A. (N.S.) 1091, not to be libellous per se.

The question of liability growing out of giving or refusing information affecting character or reputation of servant is the subject of a note to this case.

Homicide.—Malice in a homicide case is held, in Mann v. State (Ga.), 4 L. R. A. (N.S.) 934, to be presumed, unless circumstances of alleviation, excuse, or justification appear.

The mere attempt to flee from the scene before the fatal shot is fired is held, in State v. Forsha (Mo.), 4 L. R. A. (N.S.) 576, not to relieve one from criminal participation if he has aided in, and, indeed, commanded, its commission. With this case is a note on withdrawal from participation in homicide which will relieve from criminality.

Husband and Wife.—An action for alienation of affections of a husband is held, in Nolin v. Pearson (Mass.), 4 L. R. A. (N.S.) 643, to be authorized by a statute permitting a wife to sue for injuries as if sole.

The probable accretions of wealth to the husband are held, in Muir v. Muir (Ky.), 4 L. R. A. (N.S.) 909, proper to be considered as a basis for alimony.

Innkeeper.—A saloon keeper is held, in Anderson & Co. v. Diaz (Ark.), 4 L. R. A. (N.S.) 649, not to be liable for a personal injury to a patron by the bartender and others, who put alcohol on his feet and set it afire.

Insurance.—An agent's insertion of false answers in an application is held, in Deming Invest. Co. v. Shawnee F. Ins. Co. (Okla.), 4 L. R. A. (N.S.) 607, not to be binding on the insurer where the representations are warranted by the applicant to be true, and the insurer has not ratified the agent's act.

Master and Servant. — Attempting dangerous work in obedience to orders is held, in Choctaw, O. & G. R. Co. v. Jones (Ark.), 4 L. R. A. (N.S.) 837, not to involve an assumption of the risk if it was not fully appreciated.

Knowledge of defective conditions is held, in Tuckett v. American Steam and Hand Laundry (Utah), 4 L. R. A. (N.S.) 990, to be insufficient to make an assumption of the risk by an employee, if the danger is imperfectly appreciated.

Injury to a child invited by an employee to ride on a waggon, but who falls off, is held, in Foster-Herbert Cut Stone Co. v. Pugh (Tenn.), 4 L. R. A. (N.S.) 804, not to make the master liable.

Sunday.—A contract made on Sunday, the formalities of completing which are not finished until another day, is held, in Jacobson v. Bentzler (Wis.), 4 L. R. A. (N.S.) 1151, to be illegal.

Trade Union.—Money paid on demand of a union to prevent a boycott is held, in March v. Bricklayers' & P. Union No. 1 (Conn.), 4 L. R. A. (N.S.) 1198, to be recoverable on the ground that it was got by extortion.

BOOK NOTICE.

Williams on Personal Property:—Principles of the Law of Personal Property Intended for the Use of Students in Conveyancing, by the late Joshua Williams. The Sixteenth Edition, by his son, T. Cyprian Williams, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Limited: 1906. (21 shillings.)

The first edition was published in 1848 and the fifteenth in 1900. The six years that have since elapsed have added by legislation and judicial decision to the admitted difficulties of several of the subjects discussed; the editor has done his best to clarify them, and has certainly proved the necessity for a fresh edition, which, in spite of difference in the statute law, will be useful in all the provinces of Canada.

PERIODICALS AND PAMPHLETS.

The True Way to Simplify our Land Titles and Improve our Land Taxing System. The Torrens System of Land Transfers, the German System of Titles and Taxation, and other Land Title Systems, as related thereto. By John T. Kenney, of the Madison, Wisconsin, Bar. An address before the State Association of Wisconsin Abstracters, at Madison, 16th August, 1906.

Harvard Law Review (January, 1907):—"The Legal Aspect of Monopoly," by Herbert Pope; "Several Problems of Gray's Rule against Perpetuities," by Albert Martin Kales; "Change of Position as a Defence in Quasi-Contracts—The Relation of Implied Warranties and Agency to Quasi-Contracts," by George P. Costigan jun.

Green Bag (Boston, December, 1906): — "Thaddeus Stevens as a Country Lawyer," by W. U. Hensel; "Appointments to the United States Supreme Court," by James Schouler; "Control of Corporations," by F. N. Judson; "Orange Routing Case," by William A. Bowen; "How Should Evidence be Taught?" by Charles F. Chamberlayne.

Columbia Law Review (New York, December, 1906, and January, 1907):—"Some Suggestions concerning the Law of Fixtures," by Joseph W. Bingham; "The Doctrine of Boston Ice Co. v. Potter," by George P. Costigan jun.; "New York Mortgages and the Recording Acts," by Edgar Logan; "The Rule in the Clarkson Home Cases," by F. Dwight; "The Rights of the Trustee under sec. 67 A of the National Bankruptcy Act," by Garrard Glenn.

American Law Review (St. Louis, November-December, 1906):—"Hamilton Fish, Secretary of State," by Alfred Spring; "The Non-Federal Law Administered in Federal Courts," by William Trickett; "The Code Napoleon;" "The Duty of the Bench to the Bar;" "The Court v. The Mob," by Edwin Maxey; "The Privilege of Silence and the Immunity Statutes," by Franklin A. Beecher.

Michigan Law Review (Ann Arbor, December, 1906, and January, 1907):—"Some Contributions of Psychology to the Conception of Justice," by James H. Tufts; "Delegation of Authority by an Agent," by Floyd R. Mechem; "James Valentince Campbell," by C. A. Kent; "The Revision of the Laws of the United States," by Everett P. Wheeler.

Natal Law Quarterly (30th September, 1906):—"The Law of Libel with Regard to Public Bodies," by C. J. Ingram, LL.B.; "Negotiable Instruments;" "Landlord's Hypothec over Goods of Third Parties."

Archiv fur Burgerliches Recht (Berlin, December, 1906.)

General Digest American and English (Rochester, N.Y., No. 53, October, 1906.)

Federal Reporter (National Reporter System, 6th, 13th, 20th, 27th December, 1906, 3rd January, 1907.)

Law Notes (Northport, N.Y., December, 1906, and January, 1907.)

Chicago Law Journal (7th, 14th, 28th December, 1906, 4th January, 1907.)

Chicago Legal News (3rd, 24th November, 8th, 15th, 22nd, 29th December, 1906, 5th January, 1907.)

Law Student's Helper (Detroit, Mich., November, 1906.)

Central Law Journal (St. Louis, Mo., 7th, 21st, 28th December, 1906, 4th January, 1907.)

Calcutta Weekly Notes (26th November, 3rd and 10th December, 1906.)

Kathiawar Law Reports (November, December, 1906.)

The Digest (Lahore, September-October, 1906.)

Criminal Law Journal of India (Lahore, 15th November, 1906.)

Madras Law Journal (September and October, 1906.)

Madras Law Times (Nos. 13, 14, 15, 16, of volume 1, 1906.)

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W. T. WHITE,
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THE
CANADIAN LAW TIMES.

FEBRUARY, 1907.

THE DOCTRINE OF SCIENTER, ITS EXCEPTIONS, AND THE REASON FOR ITS EXISTENCE, IF ANY.

THE liability of the owner of a horse, dog, bull, or other animal of a like character, where the animal kicks, bites, or gores, is founded on an artificial rule, and one the reasonableness of which is perhaps more than questionable. The rule is that scienter or knowledge of the ferocious character of the animal is necessary on the part of the owner before liability for the injury can be established. This has been so long admitted (it is to be found in almost the words of our Judges to-day in the Roman law, from which our early English Judges no doubt borrowed it) that any change in it unless by statutory enactment is scarcely to be hoped for.

That the reckless or wilful doing of an act amounting to a tort and causing damage, is necessary, will not now be contended. I am equally liable for an assault where it is involuntary, as where I so commit it with the greatest malevolence, laying out of sight the criminal law and the quantum of damages. I am equally liable to A. where my cattle go upon his lands and destroy his crops: where (1) I drive them there; (2) where they get there through my ill-kept fence; and (3) where B. wilfully or negligently lets down the bars of my fence in trespassing on my lands and altogether against my will.

Lord Blackburn in Smith v. Cook (1875), 1 Q. B. D. 79, at p. 83, says: "The doctrine of scienter, which depends mainly on authority, ought not to be extended," etc.

It may be interesting and profitable to see how the doctrine has been limited by recent decisions.

Patterson v. Fanning (1901), 1 O. L. R. 412, decides that where an animal (a horse) doing the damage, was unlawfully (contrary to terms of a city by-law) at large on the highway (and this through the negligence of the owner), though this latter fact seems in reason to be hardly material to the issue, the owner was liable without proof of knowledge of vice.

In Ellis v. Loftus Iron Co. (1875), L.R. 10 C.P. 10, where the animal (a stallion) trespassed by putting his head and afterwards or before, which does not appear, his heels, through the dividing fence and over the close of the plaintiff, and bit and kicked the plaintiff's mare, it was held that the defendant was liable, although it was shewn that so far from being vicious to the owner's knowledge, he was known to be an animal of extremely mild disposition.

In Smith v. Cook (1875), 1 Q. B. D. 79, it was held that the defendant, an agister, without proof of scienter, was liable to the plaintiff, the owner of a young horse placed with the agister for pasturage, which was gored to death by one of the defendant's bulls which had been left in the adjoining close, from which it could and did make its way into the pasture where the plaintiff's horse was.

The doctrine of scienter, if it can rationally be supported at all, is to be so supported, not on the ground that the owner is not responsible for the tortious acts of his animals precisely as he would be for his own, but that the acts to which the doctrine applies are not the natural result of the keeping of such animals, and that consequently the damages are too remote.

Though not a case of damage by an animal, Pearce v. Sheppard (1893), 13 C. L. T. Occ. N. 403, 24 O. R. 167, invokes the same principle of law as Smith v. Cook. This was also a case of an agister, who had left near the pasture a well the covering of which, planks, had in the natural

course of events become rotten and unsafe, although the agister was not aware of this fact. A horse which was being agisted found its way to the well and broke through the covering and was killed or injured. The trial Judge nonsuited the plaintiff on the ground that he failed to prove that the defendant was aware of the condition of the covering of the well. A Divisional Court, Boyd, C., Ferguson and Meredith, JJ., directed a new trial, holding that there was evidence to go to the jury of negligence; Meredith, J., dissenting on this ground and holding with the trial Judge. It is to be noted that the head-note of the report is erroneous in stating that there was knowledge on the part of the defendant. As before said, Meredith, J., dissents from the other members of the Court, he holding that knowledge was necessary.

It seems hard to distinguish from Ellis v. Loftus Iron Co. the case of Cook v. Waring (1863), 2 H. & C. 332, which was a case in which the defendant's sheep affected with scab escaped from his pasture, trespassed on the plaintiff's close, and infected his flock of sheep, the defendant not being aware that his sheep were so infected. It was held in the latter case that the damage, the carrying and giving the disease, was not the natural consequence of the trespass under the circumstances, and the damage was too remote.

This ground was not raised nor this case cited in Ellis v. Loftus Iron Co.

WILLIAM STEERS.

Lindsay, 15th January, 1907.

THE INFLUENCE OF LAW BOOKS.

That literature has exercised, and continues to exercise, a profound influence upon the thoughts and actions of mankind every one will readily concede. Some, perhaps, might hesitate before agreeing that what is true of the fair domain of letters as a whole is equally true of the special corner of it which is devoted to the cultivation and propagation of law. Yet that it is so, no student of the history of jurisprudence can have failed to notice. It was so in the history of Roman law, and it is so in the history of our own. It may be conceded, indeed, that legal treatises are not in general esteemed particularly notable contributions to literature, yet now and again an epoch-making work makes its appearance—a work which at once arrests attention and makes its influence felt within the profession and oftentimes far beyond it. Such a book was Blackstone's Commentaries, which, of course, although quite familiar by name to every student of the law, is, like many another classic, only admired at a distance and at second hand. For us it is somewhat difficult to estimate the full extent of its influence in its own day, seeing that so much of it has naturally, by the passage of time, become obsolete. But men like Fox, Sir William Jones, Gibbon, and Lord Mansfield were loud in its praise, and even Bentham, who set himself to demolish much of its reasoning and to point out its many flaws and shortcomings, recognized Blackstone as "the first of all institutional writers who taught jurisprudence to speak the language of the scholar and gentleman; put a polish upon that rugged science; cleansed her from the dust and cobwebs of the office." In these words of Bentham we find the key of Blackstone's influence—his ability to present in orderly form and in language bearing the stamp of style, "the lawless science of the law." To have accomplished this was no slight merit. He attracted readers, where-

as his predecessors in legal authorship usually repelled them by their lack of arrangement and their uncultured style. But Blackstone did more than this; he set a high standard for his successors in legal authorship to strive after, and, although comparatively few of these have been able to attain unto it, yet the body of legal literature as a whole has been considerably raised—a result largely traceable to the author of the Commentaries. Hitherto we have been dealing with the influence of his work on law and its exposition as a whole; here is an instance of its influence exerted on an individual—on one who was destined to play a mighty part in the destinies of our kin beyond sea. We refer to Abraham Lincoln. One of the numerous employments to which, as a young man, Lincoln turned as a means of livelihood was that of keeping a store in a little country town in the States; and it was during this period of his career that Blackstone crossed his path and profoundly influenced his after life. How this came about Lincoln tells us himself in these words: "One day a western emigrant stopped at my store and asked me to buy a barrel of odds and ends of little value, for which he had no room in his waggon, with his family and household plunder. I bought it and put it away, and never thought of it again until one day, rearranging things, the stuff turned up. I found a two-volume copy of Blackstone's Commentaries. I devoured them, I assure you, and I never read anything which so profoundly interested and thrilled me. Soon after that I began the study of law, and that is how I came to be a lawyer." As one of his biographers has said, "The reading of Blackstone's Commentaries was the shock which crystallized all the results of Lincoln's omnivorous reading into one coherent unity. This chance purchase determined his career." But for this seeming accident it is probable that Lincoln would never have reached the Presidential chair, and quite conceivable that his country would have been permanently dismembered! If Blackstone's great work could give unity and purpose to the life of such a man as Lincoln, it accomplished much; its influence was potent for good.

Jeremy Bentham, the next great name in order of date to that of Blackstone, differed radically from the author of the Commentaries in his outlook on life, and in particular in his attitude towards English law. Bentham scorned Blackstone's easy optimism, derided and demolished much of his theory and reasoning, although, as we have seen, compelled to acknowledge the high quality of his work from the literary standpoint. Bentham's mission was destructive, and his mission was necessary; here it was that he made his influence felt. Mr. Bryce has said that Bentham was "the first man who had the courage to denounce the artificialities, absurdities, and injustices of the unreformed law and procedure of England. No small part of the credit for the reforms which Romilly, Brougham, and their fellow-workers carried out belongs to the man who had begun to call for them full thirty years before." Referring to his important book, The Rationale of Judicial Evidence, the late Sir James Fitzjames Stephen said that "it might be compared to a shell bursting in the powder magazine of a fortress, the fragments of the shell being lost in the ruins which it has made. The main object of the book is to shew that rules tending to the exclusion of evidence must be pernicious, and with some exceptions Bentham proved his point, and with immense advantage to the cause of truth and justice. One only of the rules which he attacked still survives, and I do not think it will do so long. This is the rule which excludes the evidence of accused persons in most cases, but the exceptions already made to it are fatal to its principle." As we all know, that last surviving rule of those which were the target for Bentham's attacks succumbed in 1898 by the passing of the Criminal Evidence Act of that year. But Bentham's influence was by no means limited to his own country; on the Continent, especially in France and Spain, his name was even more honoured than it was here, many of his writings having been first given to the world through the medium of the French language. A curious testimony to his influence in Spain is furnished by Borrow in his fascinating book, The Bible in Spain, where he tells

how in the course of his wanderings through the peninsula at the time of the first Carlist war (1835-1838) he was arrested in the remote district of Galicia, near Finisterre, on the supposition that he was none other than Don Carlos himself, and on this charge taken before the Alcalde of Corcuvion, who, of course, being an educated man, was easily satisfied that the ignorant fisherman who had arrested Borrow had made a grotesque blunder. The following singular dialogue then took place between them:—

Alcalde: "Oh! most ridiculous; mistake a countryman of the grand Baintham for such a Goth!

Myself: "Excuse me, sir, you speak of the grand somebody.

Alcalde: "The grand Baintham. He who has invented laws for all the world.

Myself: "Oh! you mean Jeremy Bentham? Yes, a very remarkable man in his way. . . .

Alcalde: "How surprising! I see, indeed, that you know nothing of his writings, though an Englishman. Now, here am I, a simple Alcalde of Galicia, yet I possess all the writings of Baintham on that shelf, and I study them day and night."

In a widely different way was the influence of another eminent legal writer—John William Smith—exerted; whose fame rests mainly on his collection of leading cases which are sure of immortality if for no other reason than the fact that their name is enshrined in the classic pages of Pendennis. A word or two as to the external history of this famous law work may be of interest. It had its genesis in a suggestion thrown out by Samuel Warren in his Law Studies—a suggestion which, when adopted by Smith, greatly delighted the heart of the childlike author of the Law Studies and Ten Thousand a Year. The first edition of the Leading Cases appeared in 1837, when Smith was only twenty-eight, and since then it has gone through ten more editions, the most recent issue, the eleventh, having been published in 1903.

Since the author's death it has had several distinguished editors, among others Sir James Shaw Willes, Sir Henry Singer Keating, and the present Master of the Rolls—to name only those of them who have reached the Bench. It has thus been a successful work; but other law books have been equally, if not more, successful, and yet of them it might be difficult to say that they have proved influential. How, then, can it be said of Smith's principal work that it was fruitful in influence in the department of legal literature? In this way: it brought home to the minds of lawyers very vividly the fact that their science does not consist of a confused welter of decisions, but that running through it are certain great principles which can be grouped together under typical illustrative cases not difficult to remember. Smith methodised case law. He further shewed that, to obtain a mastery of the law, it was advisable to go to the fountain-head, and so it was that for his motto he chose the maxim, Melius est petere fontes quam sectari rivulos. How successful he was may be gathered not only from the well-deserved applause which greeted his volumes both here and in the United States—they called forth the special commendation of Story—but also by the fact that they gave birth to a whole progeny of books compiled on similar lines and dealing with other branches of the law; indeed, hardly any department of law but has now its volume of leading cases relating to it, all this being due to the influence exerted by John William Smith.

We have chosen these three names, Blackstone, Bentham, and Smith, differing widely each from the other, each working on different lines—Blackstone making law attractive to read, Bentham making it more human and more conformable to common sense in its operation, Smith making its study more scienter and more easy; but all alike in this, in exerting upon law as a whole an influence which has been enduring and beneficial.

(*The London Law Times.*)

THE REMUNERATION OF SOLICITOR-TRUSTEES.

Re Chalinder and Herrington, Solicitors, noted 122 L. T. Jour. 86, is a case which will repay the perusal of all solicitors. It deals with the well-established doctrine under which solicitor-trustees are precluded, in the absence of express provisions for the purpose, from making a profit out of their trusts. Most of the orthodox books of precedents contain some approved forms to remove this disability, and amongst these is the well-tried clause in Wolstenholme's Forms and Precedents. This not only provides expressly for the solicitor being entitled to all usual professional charges for business transacted, and acts done by him or any partner of his, in connection with the trusts, but it also includes "acts which a trustee not being in any profession or business could have done personally."

In the case under comment, the will contained no such words in the clause affecting the dispute as to whether the solicitor-trustee could or could not charge against the estate for work done by himself or his firm in respect of matters capable of being performed by a trustee personally, and not calling for the employment of a solicitor. The clause in question appointed E. C. (inter alios) executor and trustee, and, after giving him a conditional legacy, directed that "my trustee E. C. shall be the solicitor to my trust property, and shall be allowed all professional and other charges for his time and trouble, notwithstanding his being such executor and trustee." This form of words having been deemed by a taxing master sufficient to justify the allowance of items representing the costs for business done by E. C. or his firm of a nature capable of being performed by a trustee personally and not needing a solicitor's attention, a beneficiary took out a summons to review the taxation. The argument on his behalf was that the clause signified an intention that the solici-

tor should charge for his professional services qua solicitor in respect of items which, had he been employed by a lay trustee, could have been charged against the trust estate, but that it did not entitle him to charge for work which, if a trustee had got a solicitor to do for him, would have had to be paid for by himself and not by the estate. Mr. Justice Warrington favoured this view, and held that the clause did not allow the solicitor-trustee to charge for work not purely professional or which could have been done by a lay trustee. The learned Judge held that, in order to entitle a solicitor-trustee to payment for work for which an ordinary trustee could not be paid directly, nor be allowed recoupment for what he had paid to another person, it is requisite to shew a clear intention to that effect. With this expression of judicial opinion, the case goes back to the master for reconsideration.

The learned Judge would certainly remember the case of Re Devereux and Re Charles Garrod, 112 L. T. Jour. 430, in which he was himself counsel, where a power was given to pay out of the estate for all "professional and other charges" (these same words occur in the recent case) as if the solicitor-trustee had been employed by the trustees so to act. This was construed somewhat strictly, for, on no evidence being shewn that the solicitor-trustee had been employed to do non-professional work (such as rent collecting), it was held that the attempt to obtain remuneration failed.

In In re Robinson, Clarkson v. Dixon, 83 L. T. Rep. 164, reported as Clarkson v. Robinson in [1900] 2 Ch. 723, the clause contained the words "whether in the ordinary course of his profession or business or not;" this authority to a trustee to charge was held by Mr. Justice Buckley (as he then was) not to justify charges for time and trouble in respect of attendance at periodical meetings. It will be noticed that the expression "time and trouble" occurs in Re Chalinder and Herrington (ubi sup.)

In In re Fish, Bennett v. Bennett, 69 L. T. Rep. 233, [1893] 2 Ch. 413, the clause had words referring to work

personally done by the solicitor-trustee, for it contained the sentence "including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed, in person by a trustee not being a solicitor." The Court of Appeal there held that the solicitor-trustee could charge for his trouble.

In In re Ames, Ames v. Taylor, 25 Ch. D. 72, the will authorized any trustee who might be a solicitor to make the usual professional or other proper and reasonable charges for all business done and time expended in relation to the trusts of the will, whether such business was usually the business of a solicitor or not. The report is not very illuminating as to the precise nature of the work which the solicitor-trustee had performed, but it at any rate makes it plain that a form of words such as the above may be relied upon as approving charges for business not strictly of a professional nature when properly incurred.

A case worth comparison with In re Ames (ubi sup.) presents itself in In re Chapple, Newton v. Chapman, 51 L. T. Rep. 748, 27 Ch. D. 584. There the will contained a clause empowering a solicitor-trustee "to make the usual professional charges," and entitling him "to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendance, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of my said will . . . as if he, not being himself a trustee or executor hereof, were employed by the trustee or executor. . . ." The taxing master had deleted non-professional items, and Lord Justice Kay (then Mr. Justice Kay) supported his view. It will be noticed that the words in In re Ames (ubi sup.), "other proper and reasonable charges," have not any equivalent in this case.

These and other cases to which reference could readily be made seem to establish the proposition that the courts will construe with some jealousy these clauses, and will deem a liberty to charge for professional services as indicating ser-

vices strictly professional, and exclusive of matters such as attendances to pay premiums, to sign transfers, and the like, which an executor should manage without the intervention of a solicitor: see Harbin v. Darby, 2 L. T. Rep. 531. To secure the fuller scale of remuneration very explicit terms are needed. We have already alluded to the form suggested by Mr. Wolstenholme. In Key and Elphinstone (8th edit.), vol. 2, p. 844, is another precedent giving power to charge for professional services and for any business done by the solicitor-trustee, whether in the ordinary course of his profession or business or not, "and although not of a nature requiring the employment of a solicitor or other professional person." At p. 529 will be found yet another form, where power is given to trustees to employ agents and to charge for professional business.

It may also be worth while to point out that the learned Judge in In re Chapple (ubi sup.) referred to a precedent in the third edition of Mr. Wolstenholme's book on the Conveyancing Act, and, in doing so, observed: "I must say, however, that the form to which I have just referred is, in my opinion, one which no solicitor ought to put in its entirety into a will drawn by himself, unless the testator has expressly instructed him to insert those very words." This is an important dictum to bear in mind in all cases where these questions are under consideration.

It has once or twice been suggested that a solicitor-trustee receiving remuneration for his services may occupy a more than usually responsible position in the case of a loss of trust property. Lord Justice Romer (when a Judge of first instance) seems to indicate in Johnson v. Palmer, 67 L. T. Rep. 797, [1893] 1 Ch. 71, that the fact of remuneration does not increase the liability; but a more recent case before the Privy Council—viz., National Trustees Company of Australasia v. General Finance Company of Australasia, 92 L. T. Rep. 736, [1905] A. C. 383—contains some observations by Sir Ford North which reflect on the duty of joint stock

companies acting as trustees for reward. What the courts would decide, were the problem to present itself in a neat form, is not entirely plain. It does not seem inconsistent with abstract justice to make some distinction regarding the liabilities of those who act gratuitously in a post where the kicks are commoner than the ha'pence which a solicitor-trustee may earn in greater or lesser profusion under clauses such as those to which we have adverted.

(*The London Law Times.*)

RECENT CASES FROM THE TIMES LAW REPORTS.*

Banks and Banking.]—In Bevan v. National Bank, and Brown v. Capital and Counties Bank, 23 T. L. R. 65, it is held by Channell, J., that a banker does not lose the protection of s. 82 of the Bills of Exchange Act (s. 81 of 53 V. c. 33, D.), merely because, before a crossed cheque paid in by a customer is cleared, the banker makes a credit entry in the bank's books or in the pass book, not communicated to the customer, distinguishing Capital and Counties Bank v. Gordon, 19 T. L. R. 462, [1903] A. C. 240, in which it was said that where credit was given for a cheque as soon as it was handed in and a cheque was allowed to be drawn against it before it was cleared, the receiving banker received the money not for his customer, but for himself as a holder for value. In Mr. Justice Channell's opinion, when in that case the House of Lords talked about credit being given, they meant credit being effectively given. An entry in a person's own book in such a case had clearly no effect until communicated to the person interested. In this case a business was carried on in the name of "Malcolm Wade and Co.," Wade, however, having no interest in the business, though he had the entire management of it. The Judge was of opinion that the use of Wade's name, coupled with the fact that he was there in the apparent management of the business, amounted to a holding out of Wade as a partner, but he did not think there was any evidence upon which he ought to find that Wade was held out to anybody as the sole proprietor of the business. It would be negligence for a banker to receive payment for a customer of a crossed cheque marked "account of payee," if the banker had information which might lead him to think that the account

* Volume 23, Nos. 4, 5, 6, and 7, to week ending December 11, 1906.

into which he was paying the amount was not the payee's account, though in the particular circumstances of the case he did not consider that the defendants were negligent.

Compensation for Lands Injuriously Affected.]—Horton v. Colwyn Bay Urban District Council, 23 T. L. R. 75, is an interesting case on the question of the compensation payable in respect of land injuriously affected by the exercise of statutory powers. A local authority, empowered to construct certain sewage works, had, after due notice, laid sewers in the claimant's land and paid compensation in respect thereof. The claimant afterwards gave notice that he claimed further compensation in respect of a sewage outfall, pumping station, and reservoir, which were built, not upon land taken from the claimant, but on land owned by the respondents themselves. The buildings and the sewers which the respondents had laid upon the claimant's lands connected together form one system of sewage. The claim to compensation was made under s. 308 of the Public Health Act, 1875, which provides that "where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers." It was not contended that the erection of the buildings amounted to a tort or actionable nuisance. The arbitrator awarded damages under the further claim, subject to the opinion of the Court as to whether or not the claimant was entitled to damages for injury to his land by the erection of buildings on land outside that part of his land taken by the respondents under their compulsory powers. Bigham, J., in giving judgment for the respondents, said that such damages could not be recovered in an action at common law if the claim were based on the mere fact of the erection by the respondents of the pumping station and reservoir on their own land, and it did not make any difference that these buildings were connected with the sewers

laid under the claimant's, so as to constitute one system of sewage. He could see no reason why damages awarded in respect of sewers laid on the claimant's land should be increased by compensation for acts done on land which was not and never had been the claimant's. In his opinion the exercise of the statutory powers must consist of something done on land taken from the claimant by the public body, or on land held by him.

Conflict of Laws.]—In Hansen v. Dixon, 23 T. L. h. 266, an action for breach of promise of marriage, the defendant, who resided in England, wrote an offer to the plaintiff, resident in Denmark, in the English language, and received an acceptance in the same tongue. The defendant knew nothing of Denmark, except that he had visited it several times, and had no knowledge of the Danish law or language. According to the evidence of the plaintiff, it was intended that the marriage should take place in England, and that the married home was to be there. Bray, J., thought that in the circumstances mentioned, the inference he ought to draw was that the defendant's offer was an offer of a contract to be governed by the law of England, and that prima facie when the plaintiff accepted this offer, she completed a contract to be governed by English law. In his opinion, therefore, the action was maintainable. Evidence was given by a Danish barrister at the trial to the effect that only in certain circumstances could an action be brought in Denmark for breach of promise, and that if the circumstances did not exist a woman had no remedy. It seemed to Bray, J., that all that that statement proved was that in Denmark there was no remedy by way of action for breach of promise except in certain circumstances, which did not exist in this case, and that the defence on this ground failed, the remedy being merely a question of procedure, and the defendant having been unable to prove that there was anything in Danish law which prevented the action from being brought in England.

Defamation.]—In Lyne v. Nicholls, 23 T. L. R. 86, the plaintiff and the defendant were publishers of rival newspapers published in the same place. The plaintiff printed statements in his paper that the circulation of his paper was "20 to 1 of any other paper in the clay district," and that "where others count by the dozen we count by the hundred." The plaintiff's and defendant's were the only papers locally published, though there were other papers in the district. It appeared that a wordy warfare had been carried on between the two papers prior to the publication of the statements complained of. Swinfen Eady, J., found that the statements were wholly untrue, and that they referred to the plaintiff's paper, but was of opinion that the plaintiff had not proved special damage, and that the action therefore failed; adopting the statement of the law in Lord Watson's judgment in White v. Mellin, [1895] A. C. 154, at p. 167, 11 T. L. R. 236, as follows: "In order to constitute disparagement which is, in the sense of the law, injurious, it must be shewn that the defendant's representations were made of and concerning the plaintiff's goods, that they were in disparagement of his goods, and untrue, and that they have occasioned special damage to the plaintiff."

Directors.]—In Peel v. London and North Western R. W. Co., 23 T. L. R. 85, the directors of the company, whose policy was attacked, had sent out to the shareholders circulars and stamped proxies with the names of certain directors inserted therein as proxies, and stamped envelopes for return, explaining their policy and asking for the shareholders' support at the ensuing meeting. The Court of Appeal held, reversing the decision of Warrington, J., that the directors were justified in doing so, and were entitled to be indemnified out of the funds of the company against any costs thus incurred. In the opinion of Lord Justice Vaughan Williams, the directors had a positive duty to inform the shareholders of the facts, of their policy, and their reasons why they considered

this policy should be maintained. He felt bound to disagree with the judgment of Kay, J., in Studdert v. Grosvenor, 33 Ch. D. 528, 2 T. L. R. 811, upon which the judgment of Warrington, J., in the present case was, to a large extent, based.

Divorce.]—In Tulk v. Tulk, 23 T. L. R. 120, on the petition of the wife for divorce, it appeared that the petitioner had herself committed adultery. The petitioner sought to avail herself of the provisions of the English Matrimonial Causes Act allowing the Court to exercise its discretion as to granting divorce, notwithstanding the petitioner's misconduct, where the respondent has so acted as to conduce to it. It appeared that the petitioner had relatives to whom she might have applied for assistance when deserted by her husband, and it was held that the petition must be dismissed, as the petitioner's adultery was not the reasonable and necessary result of the respondent's desertion.

Highway.] — In Mayor, etc., of Wednesbury v. Lodge Holes Colliery Co., 23 T. L. R. 80, the Court of Appeal, reversing the decision of Jelf, J., 21 T. L. R. 569, held that where the subsidence of a highway, vested in the plaintiffs as a highway authority, has been caused by mining operations of the defendants, the damages are not limited to the amount necessary to make the highway commodious to the public as before, but that the plaintiffs may recover the cost of restoring the highway to its original level. The Master of the Rolls points out that cases of trespass to land in which the measure of damages is not the cost of restoring the status quo ante, but the difference in value of the locus before and after, have no application to an action on the case by the person who is under an obligation, as here, to make good the mischief, in which case the damages must clearly be not the depreciation in value attributable to his injuria, but the cost of reparation. Lord Justice Cozens-Hardy was also of opinion that the position of a road authority is better than that of a

private owner, inasmuch as the rights of the public, of which the road authority is the guardian, are involved.

Indemnity.]—In John Greenwood (Limited) v. Hawkings, 23 T. L. R. 72, a contractor sent to a sub-contractor selected by the architect to do certain work, a written order to execute the work, the order concluding: "You agree in accepting this order to sign and send per return of post, the enclosed accident indemnity required by our insurance company of all sub-contractors." The indemnity was to hold the contractor and the insurance company harmless from claims under the Workmen's Compensation Act, 1897, by any person employed on the work by the sub-contractor. The sub-contractor, the defendant, returned no answer and did not fill up the form of indemnity, but went on and did the work. An accident happened to one of his workmen, for which the contractor, the plaintiff, had to pay compensation, and the plaintiff claimed indemnity. It was held by Bingham, J., that the order being sent, the defendant could accept it by doing the work just as well as by writing a letter of acceptance and then doing the work. One might have supposed that in the hurry of business the defendant had omitted to sign the form, but it seemed that the defendant purposely did not sign it. If so, he did something which he should not have done, and in the Judge's opinion the work was executed upon the footing of the order given by the plaintiffs and the document which was enclosed for the defendant to sign.

Landlord and Tenant.]—Henderson v. Arthur, 23 T. L. R. 60, was an action to recover a quarter's rent under a covenant in a lease, by which the rent was payable quarterly in advance, the defendant covenanting with the plaintiff to "pay the said yearly rent hereby reserved at the times and in the manner hereinbefore appointed." The defendant alleged that before the lease was executed there was a parol agreement between the parties that the rent should be paid, each quarter, by the defendant accepting a bill at three months for the

amount of the quarter's rent, which the defendant denied. The Court of Appeal held that the meaning of the covenant was to pay in cash, and that evidence of the parol agreement was inadmissible.

Parties.]—The English Rules corresponding to Ontario Rules 186 and 192 are considered by the Court of Appeal in Bullock v. London General Omnibus Co., 23 T. L. R. 62, in their application to the joinder of two defendants in an action of tort in which the plaintiff alleged a joint tort and also made a charge against one tort-feasor, and in the alternative a charge against the other. It was contended that these Rules only applied to actions of contract and not to actions of tort. The Master of the Rolls could see no reason for drawing such a distinction or for holding that they were so limited. The trial Judge having had evidence before him that the attitude taken by the omnibus company made it reasonable for the plaintiff to join the other defendants, an order that the costs of the successful defendant should be added to the costs of the unsuccessful defendant and should be paid by the latter, so as to enable the plaintiff to recover all the costs from the unsuccessful defendant, was held to be rightly made.

Payment into Court.]—The English Order 22, Rule 6 (c), dealing with payment into Court with a denial of liability, is considered in Powell v. Vickers Sons and Maxim (Limited), 23 T. L. R. 78. The defendants paid money into Court with a denial of liability, in an action for breach of contract. The plaintiff recovered less than the amount paid in by the defendants, and an order was made that the defendants should recover against the plaintiff their costs of the action, and that the plaintiff should recover his costs of the issues decided in his favour, to be set off against the defendants' costs; and that the money in Court should remain in Court until further order. On appeal from this order the Court of Appeal held that, as the cause of action existed and was not satisfied until the payment into Court, the plaintiff ought to have the costs

of the action down to the time of payment in, there being nothing in the Rules to the contrary, adopting the statement of the practice in the Annual Practice, 1907, at p. 286. The Court were further of opinion that the money in Court should be paid out to the plaintiff. It was said that the provision of Order 22, Rule 6 (c), that "the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim," was peremptory. But according to the rule the money was in Court "subject to the order of the Court or a Judge." The result was that the plaintiff was prima facie entitled to have the money in Court applied in satisfaction of his claim, unless there was something which satisfied the Judge that he would be justified in ordering the money to remain in Court.

Railway Company.]—Some interesting questions as to the implied powers of joint stock companies are involved in Attorney-General v. Mersey R. W. Co., 23 T. L. R. 129. Incidentally some light is thrown upon the practical operation of municipally owned transportation systems. The defendants' railway ran through a tunnel under the river Mersey. The real plaintiffs were the corporation of Birkenhead, who owned a ferry crossing the river to Liverpool. Lively competition set in, and the corporation, which also owned the city tramway system, took care that the tram routes converged at the ferry and avoided the railway station. The railway company thereupon started an omnibus system, which carried passengers to and from their railway, and also did a general business in carrying persons, other than railway passengers or intending passengers, from point to point along their routes, the fares varying according to distance, not only to and from the station, but between intermediate points. The plaintiff claimed a declaration that, as the defendants' special Act contained no express power to carry on the business of omnibus proprietors, the establishment of the system in question was ultra vires, and the defendants had no power to run omnibuses either to and from the station or between

intermediate points on the several routes. Warrington, J. (22 T. L. R. 353), granted an injunction restraining the railway company from operating the omnibus service at all. The Court of Appeal have now held unanimously that this order is too wide in its terms, but the Court is somewhat divided in its views as to what the rights of the railway company really are. Vaughan Williams and Moulton, L.JJ., distinguish between the running of omnibuses for the conveyance of passengers or intending passengers by the railway—this they hold to be incidental to the railway business, reasonably required and therefore intra vires—and the carrying of "pick-up" passengers, which is ultra vires. Buckley, L.J., holds that nothing the defendants were shewn to have done was ultra vires. Moulton, L.J., added that if the defendants ceased to solicit passenger traffic between intermediate points, the public by using the omnibuses between such points could not make the defendants' system ultra vires. In the end the injunction was dissolved upon the understanding that the railway company would modify their system so as to bring it within their statutory powers. The exact terms of the undertaking to be given by the defendants were left for further discussion. The company were to be left free to supply omnibus facilities for passengers to and from their station; but were to abandon separate fares for passengers between intermediate points and make all fares to or from some one of their stations.

THE LATEST ONTARIO DECISIONS.*

Assignments and Preferences.]—An appeal by the defendant Scott in Federal Life Assurance Co. v. Stinson, from the order of a Divisional Court, 7 O. W. R. 777, noted 26 C. L. T. 497, was dismissed by the Court of Appeal: 8 O. W. R. 929. The case is an interesting one. Upon the usual reference under a judgment for foreclosure or redemption in an action upon a mortgage, four judgment creditors of the mortgagor having writs of fi. fa. lands in the sheriff's hands were added as parties in the Master's office. and proved claims upon their respective judgments. The Master made his report by which he found that they were the only incumbrancers, and appointed a day for payment by them of the amount found due to the plaintiffs as mortgagees. After confirmation of the report, the respondent obtained assignments of the judgment, and was added as a party defendant by the Master's order. He then redeemed the plaintiffs by payment of the amount found due, and the Master took a subsequent account as between him and the mortgagor in respect of his claims on the mortgage and judgments, and appointed a day for payment by the mortgagor of the total amount. After confirmation of this report, and before the day named for payment, the mortgagor made an assignment for the benefit of his creditors under the Assignments and Preferences Act to the appellant, upon whose application an order was made adding him as a party, extending the time for redemption, and directing a reference back to the Master to take a new account and appoint a new day. The Court of Appeal held, Meredith, J.A., dissenting, that, notwithstanding the provisions of s. 11 of the Assignments and Preferences Act, the appel-

* Short notes of the most important cases in Volume VIII. of the Ontario Weekly Reporter. Nos. 22, 23. 24. pp. 855 to end of volume; and in Volume IX., No. 1. pp. 1 to 64, inclusive.

lant was not entitled to redeem by payment of the amount due upon the mortgage only, and thus take priority of the respondent in respect of his claim upon the judgments.

Conspiracy.]—Certain of the defendants in Copeland-Chatterson Co. v. Business Systems Limited, 8 O. W. R. 888, while in the employ of the plaintiffs, combined in a scheme to form a rival company under the name "Business Systems," an expression used by the plaintiffs to designate the nature of their business, to carry on a business similar to that of the plaintiffs, whereby they sought to secure a large part of the plaintiffs' business, and, to this end, held many meetings, discussed the matter frequently, obtained private and confidential information relative to the business of the plaintiffs, which they utilized in preparing a prospectus of the new company and in its after operations, induced the servants of the plaintiffs to leave their employ—none the less a wrong that such servants were willing—and carry away with them certain special tools used in the manufacture of machinery peculiar to the plaintiffs' trade, and certain papers containing information acquired while they were in the confidence of the plaintiffs. The defendant company were incorporated for the express purpose of carrying such scheme into effect, and the business was managed by the individual defendants, and the company had, as far as a company might without formal by-law or resolution, adopted and taken the benefit of the actions of such defendants. Clute, J., held that the defendants, having broken the confidence of their employers to the damage of the latter, had passed beyond the line limiting any right they may have had to acquire information and use the same in a new business and to make preparations for such prospective business, and granted a perpetual injunction and a reference as to damages.

County Court Appeal.]—The decision of a Divisional Court in Booth v. Canadian Pacific R. W. Co., 8 O. W. R. 860, is that there is no appeal from the order of a County

Court in term *affirming* the judgment entered at the trial upon the findings of the jury.

Discovery.]—The next friend of an infant litigant was held by Anglin, J., in Vano v. Canadian Coloured Cotton Mills Co., 9 O. W. R. 10, not to be a "party to an action or issue" (see English Order xxxi., Rule 1 and Rule 29; In re Corsellis, 48 L. T. 425), so as to be liable to be examined for discovery under Rule 439, or "a person for whose immediate benefit an action is prosecuted or defended," within the purview of Rule 440.——Upon an appeal from an order reversing an order for a better affidavit on production from the defendants in an action for an account of the business of the defendants under an agreement with the plaintiffs giving them a share in the profits, a Divisional Court in Engeland v. Mitchell, 9 O. W. R. 31, while affirming the order appealed from, did not absolutely deny the production sought, but postponed the consideration of the matter until it should be properly determined upon the record, not upon interlocutory motion, as a matter of practice: (1) whether the agreement set up was within R. S. O. 1897 c. 157, ss. 3 and 4; and (2) whether (if it was) the statements of profits declared by the defendants could be impeached for fraud, error, mistake, or other like cause.

Division Courts.]—An order refusing prohibition was affirmed by a Divisional Court in Re Township of Amelias-burg v. Pitcher, 8 O. W. R. 915, on the ground that the interpretation of the statute R. S. O. 1897 c. 248 by the Division Court Judge was in order to decide the rights of the parties, and not to find out whether the Division Court should decide the rights of the parties at all. Re Long Point Co. v. Anderson, 18 A. R. 405, explained.

Drainage.]—A point decided by the Court of Appeal in Fairbairn v. Township of Sandwich South, 8 O. W. R. 925, was that a municipal council can, under the Municipal Drainage Act, on a proper petition, pass a by-law assuming

an award drain, and, in the same by-law, make such drain a part of a more extended scheme of drainage under that Act.

Executors and Administrators.]—The decision of a Divisional Court in Re Church, 8 O. W. R. 983, is that where a testator has made a residuary devise or bequest, and after his decease the residuary devisee or legatee has also died, but without having received his share of the testator's estate, which, however, has been ascertained and set apart, the same becomes a trust fund in the hands of the executors and ceases to be assets of the estate, and the expenses and compensation for the services of the executors as such trustees are properly imposed upon such share to the exoneration of the general estate. The Court held that there was jurisdiction to hear the appeal under 63 V. c. 17, s. 18 (O.), amending R. S. O. 1897 c. 129, s. 40. The order, it was held, should be intituled "In the matter of the estate of Eliza Jane Erskine Church," with a sub-designation of the Athole Church trust.

Factories Act.]—It was decided by Falconbridge, C.J., in Rex v. Ferguson, 8 O. W. R. 957, that the work-shop of a merchant tailor is a "factory" within the meaning of the Factories Act, R. S. O. 1897 c. 256, s. 2, s.s. 1 (c), and that the word "owner" in s. 15 (1) (a) of the Act means the owner of the building in which such factory is operated, as distinguished from a tenant thereof who carries on the business of manufacturing upon the premises.

Fire Insurance.]—An appeal by the plaintiffs in London and Western Trusts Co. v. Canadian Fire Insurance Co., from the judgment of Falconbridge, C.J., 8 O. W. R. 273, noted 26 C. L. T. 691, was allowed by a Divisional Court (8 O. W. R. 872), on the ground that a policy with a condition as to increase of risk in the form set out in the statute (R. S. O. 1897 c. 206, s. 168 (3)), is not avoided by an increase of risk which is not within the knowledge or control

of the assured. A change, increasing the risk, by a tenant is not within the landlord's control because, for his limited interest, the tenant is as much the owner of the land as the landlord for his larger interest, and this is the case though the tenant may have been let into possession after the insurance was effected, though, if the change were made with the knowledge and express consent of the landlord, the policy might perhaps be thereby avoided.

Highway.]—An appeal by the defendants in Ludgate v. City of Ottawa, from the judgment of Mabee, J., 8 O. W. R. 257, noted 26 C. L. T. 692, was dismissed by a Divisional Court: 8 O. W. R. 865.

Husband and Wife.]—A Divisional Court in Jarvis v. Jarvis, 8 O. W. R. 902, held that the plaintiff was not entitled to a conveyance to him by the defendant, his wife, of land purchased by him and conveyed to her, or a declaration that she held the same in trust for him, because he was at the time a careful man of ordinary intelligence and strength of mind and character, who did all his own business, bought and sold horses and cattle, paid his rent, and banked his money, all without assistance, and had declared to several persons that he was buying a place for the defendant, and had instructed the conveyance to be made to her. Besides, no undue influence was shewn, or any relation of confidence that would compel the defendant to shew that the plaintiff had had independent advice. In the circumstances, it was not necessarily an improvident transaction for a farmer worth $2,400, to expend $1,150 in buying a house for his wife and to give it to her.

Jury Notice.]—The practice as to striking out a jury notice, as a matter of discretion, where there is no irregularity, is outlined by Meredith, C.J., in Montgomery v. Ryan, 8 O. W. R. 855, thus: "While the practice where the venue is laid out of Toronto is not, except in very rare cases, to make an order in Chambers, but to leave the matter to

be dealt with by the trial Judge, a different practice is adopted where the venue is laid where there are separate sittings for the trial of jury and non-jury cases, the latter practically a continuous sitting throughout the year; and in such cases, where the action is one that plainly ought to be tried without a jury, in order to prevent the jury list being incumbered with such cases, thereby involving a very considerable expense . . . the practice is to strike out the jury notice."

Limitation of Actions.]—The exclusive, actual possession, found to be continuous, peaceable, and adverse, for some 15 years, of the upper flat of a two-storey building, as well as a small landing on the ground floor, and a stairway connecting the landing with the flat in question (there being no excavation under the ground floor), was held by Mabee, J., in Iredale v. Loudon, 8 O. W. R. 963, to entitle the plaintiff, under the statute, by the extinction of the defendants' title, to the possession and enjoyment of such premises, so occupied by him, free from interference by the defendants, and any changing, altering, pulling down, or in any way dealing by them with their portion of the building in such a way that the possession, use, and enjoyment of such premises by the plaintiff should be interfered with or prejudicially affected, would be an invasion of his rights.

Local Option By-law.]—An appeal by the applicant in Re Sinclair and Town of Owen Sound, from an order of a Divisional Court, 8 O. W. R. 460, 12 O. L. R. 488, noted 26 C. L. T. 806, reversing an order pronounced by Mabee, J., 8 O. W. R. 239, noted 26 C. L. T. 583, was dismissed by the Court of Appeal: 8 O. W. R. 974.

Mechanics' Liens.]—Of very practical importance is the ruling of the Master in Chambers in Dunn v. McCallum, 9 O. W. R. 33, to the effect that, upon the proper construction of ss. 7 and 18 of the Mechanics' Lien Act, a claim of lien in respect of materials furnished for houses of separate

owners, filed against all the lands for the whole amount, is invalid. In such cases a separate account should be kept of materials furnished in respect of the property of each owner.

Mortgage.]—The defendant Grant in Watson v. Grant, 9 O. W. R. 53, had mortgaged certain lands and afterwards sold his equity of redemption to the defendant Kier. In the meantime, the mortgagees had, by an assignment registered the same day, assigned the mortgage to the plaintiff. Grant, however, without notice or knowledge of this assignment, paid to the original mortgagees the whole amount secured, and was held by Riddell, J., on the authorities, to be thereby discharged from liability. It was held, as to Kier, that the registration of the assignment to the plaintiff was notice to the former, and that he was in the same condition as if he had had actually express notice, but, nevertheless, that the plaintiff could not succeed against him in his action for foreclosure, because (and by this the case is distinguished from Gilleland v. Wadsworth, 1 A. R. 82), all parties being before the Court with a direction that the issues between Grant and Kier should be tried at the same time as the other issues, it was impossible to pronounce the usual judgment with relief over against Grant, and judgment could not be given against Kier without giving him relief over.

Pleading.]—Applying the rule laid down in Steward v. North Metropolitan Tramways Co., 16 Q. B. D. 556, that "however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs," a Divisional Court in Dominion Paving and Construction Co. v. City of Toronto, 9 O. W. R. 38, allowed an amendment setting up the terms of a special contract as an answer to an action for the value of work done.

Principal and Agent.]—An architect in charge of the building of a church requested the plaintiffs to furnish certain work and material therefor, on the understanding that the same would be paid for by the trustees. The latter had not authorized the architect to make them liable. A Divisional Court held that the architect was liable for such work and material furnished in good faith, on breach of the implied warranty that he had such authority. The Statute of Limitations was held to have no application to the case: Horwood v. MacLaren, 8 O. W. R. 857.

Railway.]—Damages to the plaintiff's farm occasioned by the greater trouble and difficulty in the use of his farm crossing owing to the change of grade by the defendants on laying a double track, were held by Boyd, C., in Knill v. Grand Trunk R. W. Co., 8 O. W. R. 870, not to be recoverable by way of action (see the Railway Act, s. 120), negligence or want of authority on the part of the defendants not being alleged or proved. The taking up of planks and blocking of the crossing by heaping up snow thereon by the defendants was held to be an actionable wrong, but to be barred by s. 242 of the Act as not sued for within one year. The plaintiff was held entitled to recover the damage suffered by blocking the drainage and piling up tiles so as to interfere with the user of the crossing.

Statutes.]—In Re Sylvester Manufacturing Co. v. Brown, 8 O. W. R. 984, it was decided by Falconbridge, C.J., that the provisions of s. 22 of 6 Edw. VII. c. 19, relating to stipulations in contracts providing for the place of trial of actions thereon, govern procedure only, and are therefore retrospective.

Succession Duties.]—The decision of Falconbridge, C.J., in Attorney-General for Ontario v. Woodruff, 9 O. W. R. 18, is to the effect that bonds of municipalities in the United States, lodged with trust companies or bankers in New York, and transferable by delivery, and actually transferred in New York, and governed by the laws of New York,

are not liable to succession duty under s. 4, s.-ss. a, c, or e, of R. S. O. 1897 c. 211, and amendments thereto.

Tax Sale.]—An appeal by the plaintiff in Beatty v. McConnell, from the judgment of Street, J., 6 O. W. R. 822, 7 O. W. R. 11, noted 26 C. L. T. 104, was allowed by the Court of Appeal (8 O. W. R. 916), because it was established either that there was a redemption of the lands by the plaintiff, or the defendant Bull had agreed to part and did part with his property and ownership in the certificates granted by the Provincial Treasurer under s. 20 of R. S. O. 1897 c. 26, with the result that his claim under them, which did not amount to ownership (see s. 21) was extinguished, and, since the power of the Treasurer to convey to Bull is made by s. 26 to depend upon the non-redemption of the lands and the continuance of ownership of the certificate by the purchaser, he could not and did not, in this case, convey them so as to pass any title thereto to Bull. The lands were not vested in the Treasurer; he had only a power to convey; consequently, as the fee remained in the plaintiff, the registry laws had no application.——The tax sale called in question in Carter v. Hunter, 9 O. W. R. 58, was declared invalid by Magee, J., for the reasons that there had been non-compliance with s. 176 of the Assessment Act, and that the description in the assessment—neither street number nor lot number being given—was not sufficient.

Trade Mark.]—An appeal by the plaintiffs in Kerstein v. Cohen, from the judgment of Mulock, C.J., 7 O. W. R. 247, 11 O. L. R. 450, noted 26 C. L. T. 224, and a cross-appeal by the defendants from the part of the same judgment which deprived the defendants of the costs of their defence, were dismissed by the Court of Appeal: 8 O. W. R. 934.

Way.]—An appeal by the plaintiff in Adams v. Fairweather from the judgment of Mulock, C.J., 7 O. W. R. 785, noted 26 C. L. T. 508, was dismissed by a Divisional Court: 8 O. W. R. 886.

CASES FROM WESTERN CANADA.*

Bankruptcy and Insolvency.]—With some hesitation, Scott, J., in Re Matejka (N.W.P.), 5 W. L. R. 1, where it appeared that after a general assignment for the benefit of creditors, one Gould, at a meeting of creditors, offered to supply goods to carry on the business of the insolvent, and a resolution was passed that this offer be accepted and an agreement entered into to become operative only after execution by all creditors having claims of $50 and upwards within 30 days, and, though all did not sign, the business was so carried on and goods supplied by Gould, held that the latter was entitled to payment of any balances due him for such goods in full, in priority to other creditors of the insolvent.

Contract.]—The defendant, an intelligent man, was held by Wetmore, J., in Anderson v. Osborne (N.W.P.), 5 W.L.R. 24, to have been aware of the mistake made by the plaintiff, in tendering for the supplying of certain lumber and materials, by which, in working out his figures, he made the total $464.88 instead of $805.19, because he had before the acceptance of the plaintiff's tender received other tenders for about the same amount as that last named, some of which shewed the items in detail, and the plaintiff was held entitled to recover on the basis of the prices contained in the lowest tender: Webster v. Cecil, 30 Beav. 62. It was held not a case for the rectification of the agreement, since that would force the defendant to accept a tender higher than most of the others.

Criminal Law.]—The defendant in Rex v. Douglas (Man.), 5 W. L. R. 6, had been bound over to appear to answer an indictment for fraudulently mortgaging real prop-

* Short notes of the most important cases in Volume IV. of the Western Law Reporter, Nos. 7 and 8, p. 537 to the end of the Volume; and in Volume V., No. 1, pp. 1 to 40, inclusive.

erty, knowing of the existence of a prior unregistered sale of the same, and obtaining money by false pretences. He subsequently elected to be tried by a Judge without a jury, and was thereafter indicted for theft, obtaining a valuable security by false pretences, and conspiracy to defraud, in addition to the charge upon which he was committed. Mathers, J., held, despite the fact that counsel for the Crown offered to waive all objections to the accused re-electing, that such indictment was bad, no leave to prefer these additional charges, substantially different from the original, having been obtained under s. 773 of the Code, or being obtainable without the consent of the accused: Regina v. Goodman, 3 O. R. 18; Rex v. Carrier, 14 Man. L. R. 52; for "the rights of an accused person depend upon what the law grants or withholds from him, and not upon the consent of the prosecuting counsel."

Defamation.]—"One can imagine, in the days of conjurations, enchantment, and witchcraft, when these and the like superstitions were rife," says Macdonald, J., in Nagy v. Manitoba Free Press Co. (Man.), 5 W. L. R. 20, "actions founded upon such a statement as contained in the article in question,"—'there is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants; his chief haunt is in a vacant house in St. John's avenue near to Main; he appears late at night and performs strange antics, so that timid people give the place a wide berth'—being in evidence, yet we find none, but in this enlightened age and generation, and in this modern city of Winnipeg, to find that such an article is a slander would be a calumny upon its people."

Fire.]—Independently of the fact that the weight of the evidence was to the effect that the fire which occasioned the plaintiff the damage sued for, was not the fire started by the defendant, Mathers, J., in Holliday v. Bussian (Man.), 4 W. L. R. 577, decided that the defendant, who was very short-sighted, and who, on finding a pile of ashes and partly burned

willow roots, moved the ashes with his foot to ascertain whether or not there was a fire, when a strong wind blowing from the south carried the embers into the adjoining dry grass, was not guilty of negligence, because he did not kindle the fire, and, when it started, tried to beat it out, and honestly and reasonably believed he had so far extinguished it that there was no danger of its spreading.

Fraud and Misrepresentation.]—Where purchasers of a horse, being told that he was much older than had been represented, while not believing such statement, became gravely suspicious, and began to search for evidence, but, before their suspicions were confirmed, which took some time, the horse died, Mathers, J., decided that they had not, by retaining and using the horse after such suspicions had been aroused, elected to adopt the contract after knowledge of the fraud; and that they were entitled to rescind notwithstanding that they could not return the horse, whose death was not the result of any default of theirs, to the vendors: Moore v. Scott (Man.), 5 W. L. R. 8.

Jury Notice.]—By s. 59 of the King's Bench Act, Manitoba, "actions for . . . illegal or excessive distress, illegal or excessive seizure . . . shall be tried by a jury." The statement of claim in Bartlett v. House Furnishing Co. (Man.), 4 W. L. R. 567, alleged that the defendants wrongfully and illegally seized and carried away from the plaintiff's dwelling-house certain household furniture, and claimed damages. Held, by Mathers, J., an action for illegal seizure within the meaning of the section.

Landlord and Tenant.]—It was decided by Newlands, J., in Tucker v. Armour (N.W.P.), 5 W. L. R. 35, that an assignee of a lease for over three years, whose assignment had not been registered under the Land Titles Act, had, notwithstanding s. 54 of that Act, a title which he could enforce against the lessor, and that, in an action to recover, on payment of the rent due, possession from such lessor, who had

re-entered under the terms of the lease without having taken any legal proceedings, it was not necessary that the original lessee be made a party. The fact that the plaintiff had sublet was held not to form a bar to his recovery, he having put the sheriff, who retained possession under a writ of attachment and execution, into possession under a distress warrant, in circumstances shewing an intention to re-enter. Moreover, the re-entry by the landlord put an end to the term granted by the plaintiff. Nor was the plaintiff debarred from recovery because he had alleged, but not proved, that the defendant had entered through fraud, since, aside from the allegation of fraud, there was sufficient alleged and proved.

Liquor License Ordinance.]—A conviction under s. 122, clause 3, of the Liquor License Ordinance, C. O. c. 89, was quashed by Wetmore, J., because it did not state that the intoxicating liquor given by the defendant to the interdicted person was so given "during the period of such prohibition," the effect of the amendment, by s. 19 of c. 32 of 1900, being to limit the offence to a giving of liquor within the period of prohibition; and because the only penalty provided was a fine of $50 and costs, without any alternative in case of non-payment, as provided by the section referred to, and contemplated in form W, in schedule 1 of the Criminal Code, 1892, which, in the absence of a form in the Ordinance for a case such as this, is prescribed by s. 104: Rex v. Harris (N. W. P.), 5 W. L. R. 4.

Master and Servant.]—An interesting point was decided by Wetmore, J., in Manson v. McKen (N.W.P.), 4 W. L. R. 545, an action for wages by a "hired man" against a farmer. The servant ate in the master's house, but lodged and slept in another house provided by the master. It was held that the servant was a domestic servant, and so came within the rule that the servant may terminate the service or the master may determine the service by one month's notice. The fact was that the servant had left without giving any notice, and Wetmore, J., deduced from the above rule the conclusion

that the servant would be liable for damages for breaking his contract, but not for a longer period than a month from the time he left. Judgment was therefore given for the plaintiff for two months' wages which he had earned before leaving, less one month's wages by way of damages.

Mechanics' Liens.]—It is provided by s. 24 (c) of the Mechanics and Wage-earners' Lien Act, Manitoba, that "the acceptance of any promissory note for . . . the claim . . . shall not merge, waive, pay, satisfy, prejudice, or destroy, any lien created" by that Act, "unless the lienholder agrees in writing that it shall have that effect." It was held, however, by Mathers, J., in National Supply Co. v. Horrobin (Man.), 4 W. L. R. 570, that, notwithstanding the statute, a right of lien is discharged by accepting and discounting a promissory note, and that the right of lien does not revive upon the dishonour of the note and its return to the hands of the person claiming the lien within the time in which a lien may be filed.

Money in Court.]—A stop order was refused, in Canadian Moline Plow Co. v. Clement (N. W. P.), 5 W. L. R. 32, against moneys in Court belonging to the plaintiffs, before judgment had been recovered in the action, by Wetmore, J., who refused to follow the ruling of the Master in Chambers in Ontario in Stickles v. Byers, 10 C. L. T. Occ. No. 41, holding that, since garnishee proceedings are entirely statutory, and no provision is made for stopping a fund in Court, to do so would have the effect of legislation. Besides, there is no provision in the Creditors' Relief Ordinance, as there is in the Ontario Act, allowing simple contract creditors to come in and share.

Pleading.]—In setting up fraud as an answer to an action for goods sold, Mathers, J., in Moore v. Scott (Man.), 5 W. L. R. 8, decides that it is necessary, to allege that, upon discovery of the fraud, the defendants rescinded the contract and restored the goods, or that, without the fault of the

defendants, restitution had become impossible, but that, while an amendment will not be allowed to set up a defence of fraud, unless under very exceptional circumstances, the same strictness does not apply to so amending a plea of fraud, already upon the record, as to make it a good plea.

Promissory Note.]—It is decided by Mathers, J., in Moore v. Scott (Man.), 5 W. L. R. 8, that a promissory note is dishonoured by a failure to pay interest on the moneys secured thereby when the same falls due, at least where interest is reserved by the note itself, and a person who becomes the holder thereafter, with notice of such non-payment, is not a holder in due course.

Railway.]—The negligence found in Northern Counties Investment Trust Limited v. Canadian Pacific R. W. Co. (B.C.), 4 W. L. R. 539, consisted in allowing an accumulation of inflammable materials on the right of way and the user of a defective engine, resulting in a fire spreading from the right of way to the plaintiffs' property. Martin, J., held that the plaintiff's action, because not brought within 6 months, was barred by s. 27 of the Consolidated Railway Act, 1879, the damages coming within the expression "by reason of the railway" used in that section. Before the defendants obtained their charter, by 44 V. c. 1 certain provisions of the Consolidated Railway Act, 1879, including s. 27, were, by s. 2, s.-s. 2, declared to be applicable to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada; and when the defendants got their charter, s. 17 provided that the Consolidated Act of 1879, in so far as the provisions thereof were applicable to the undertaking and not inconsistent with the provisions of the charter, was incorporated therein. By the general Act of 1888, s. 287, the period of 6 months mentioned in sec. 27 of the general Act of 1879 was extended to one year; and so it now stands in s. 242 of the general Act of 1903; but there has been no change in the defendants' charter. Martin, J.,

quoted the remark of Brett, L.J., in Clarke v. Bradlaugh, 8 Q. B. D. 63, 69, that "where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second;" and held that the amendment to the general Act had not altered the special Act, and therefore the statutory period was still 6 months—a far-reaching decision.

DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.*

Appeal.]—By s. 105 of the Liquor License Act of New Brunswick, C. S. N. B. 1903 c. 22, "an appeal by the inspector or other prosecutor shall lie to the Supreme Court (of New Brunswick) from the decision, judgment, or order of any Judge of a County Court, upon an appeal from any conviction or order made in cases arising out of or under this chapter, in which a conviction or order has been quashed or set aside upon the ground, directly or indirectly, of the invalidity of any Act or Acts of the legislature of this province, or of any part thereof, or from the decision, judgment, or order of the Judge of a County Court in any other case arising out of or under the chapter, in which the Attorney-General of the province shall certify that he is of opinion that the matters in dispute are of sufficient importance to justify an appeal." By s. 12 of the Habeas Corpus Act, C. S. N. B. 1903 c. 133, the Judge of a County Court is given all the powers that a Judge of the Supreme Court has in relation to habeas corpus for the discharge of persons in custody under process. One Watson was convicted by a magistrate of eleven offences against the Liquor License Act, and committed to gaol. He was discharged by a County Court Judge upon the return of a habeas corpus, and the Attorney-General having certified as required by s. 105 above, the license inspector appealed to the Supreme Court en banc; but it was held unanimously that an appeal did not lie, the order for discharge not being a case arising out of or under c. 22: McCrea v. Watson (N.B.), 2 E. L. R. 170.

Attachment.]—The decision of Graham, E.J., in Halifax Hotel Co. v. Canadian Fire Engine Co. (N.S.), 2 E. L. R.

* Short notes of the most important cases in Volume II. of the Eastern Law Reporter, Nos. 5 and 6, pp. 149 to 304, inclusive.

36, was reversed by the full Court: 2 E. L. R. 277. By Rule 6 of Order 47 of the Nova Scotia Judicature Act, "when an incorporated company has ceased to do business within the province, or has no agent within the province, or an agent cannot be discovered, and such company has property, real or personal, within the province, the proceedings may be taken against the company as are provided for in the case of absent or absconding debtors in Order 46." The Court held that the proper inference from the evidence was that the defendant company's transactions or business in Nova Scotia were confined to one sale to the corporation of the city of Halifax, which they tried to effect through the agency of a firm and an individual in Halifax, and that they had no office nor place of business within the province; and these transactions did not constitute doing business within the province so as to bring the defendant company under the provisions of the Order above quoted.

Conviction.]—There was a difference of opinion among the five Judges of the Supreme Court of New Brunswick who were sitting en banc when a motion was made in Rex v. Sweeney, Ex p. Cormier (N.B.), 2 E. L. R. 161, to make absolute a rule nisi granted by a Judge in Chambers to quash a conviction made by justices of the peace under the Canada Temperance Act. No cause was shewn, and the majority of the Court were of opinion that the old practice of making the rule absolute, without hearing argument, should be followed, notwithstanding that when that practice was established the rule nisi could only be granted by the Court itself — a recent change in the Rules having enabled a Judge in Chambers when granting a certiorari to grant also a rule nisi to quash.

Deed.]—The decision of Longley, J., in Ogilvie v. Grant (N.S.), 1 E. L. R. 117, noted 26 C. L. T. 196, was reversed by the full Court (2 E. L. R. 196), upon the ground that parol evidence admitted by the trial Judge to determine the

meaning of the vague and general expressions used in a conveyance of land from father to son, was inadmissible. "Where the words used are ambiguous, no doubt parol evidence may be given of the surrounding circumstances attending the execution of the deed to enable the Court to interpret the language, but not what the parties say themselves they intend."

Estreat of Bail.]—The question which divided the Supreme Court of Nova Scotia in 1893 in Regina v. Creelman, 25 N. S. R. 404, and again in 1903 in Rex v. Barrett, 36 N. S. R. 135, was once more before the full Court in Rex v. Burns (N.S.), 2 E. L. R. 167. The Court consisted of three Judges, two of whom held that notice to the bail requiring them to perform the condition of the recognizance was not legally necessary before estreating the bail, but the third followed the opinion of the majority in Regina v. Creelman, and held that it was necessary.

Husband and Wife.]—In Smith v. Wambolt (N.S.), 2 E. L. R. 271, Longley, J., held that a conveyance of the equity of redemption in land made by a husband to his wife in 1894, the husband being then insolvent and the conveyance not being made with intent to defraud creditors, was valid as against subsequent creditors of the husband. The Nova Scotia Married Women's Property Act of 1884, in force at the time of the transfer, did not cover the point, but, "in the absence of legislation, the law recognized such a transfer as the defendant's deed to his wife, and treated his as the trustee when the conveyance was clear"—and this irrespective of whether the deed was voluntary or for valuable consideration.

Infant.]—The mother of an infant, the father being dead, made an agreement with the father of the deceased to make over to him the guardianship of the child, in consideration of an annual allowance to be paid to her. She assented to his obtaining, and he did obtain, letters of

guardianship from the proper Court on that behalf. Upon his failure to continue the allowance after paying it for some years, she brought an action against him for breach of the contract, which was dismissed by Longley, J.: Chisholm v. Chisholm (N. S.), 2 E. L. R. 207. The contract was interpreted as one to pay the plaintiff $500 a year in consideration of the defendant becoming the guardian of the person and estate of the infant, and such a guardianship, it was held, would enable the guardian to take the child out of the custody of the mother, until it was of age, and such a contract is void and not legally enforceable. The circumstances of the case, in the view of the learned Judge, excluded any other consideration for the payment of the allowance than the transference of the custody and care of the child.

Judgment Debtor.]—The points raised in Smith v. Frame (N.S.), 2 E. L. R. 203, are of considerable interest. In 1896 the plaintiffs recovered judgment against the defendant for a large sum, and in that year a commissioner of the Supreme Court of Nova Scotia, under the Collection Act, made an order against the defendant (after an examination) for payment of the judgment debt by instalments of $10 per month, the defendant being at that time in receipt of a salary from the Dominion government of $1,000 per annum as an inspector of weights and measures. The defendant paid the instalments for about 8 years, but ultimately made default, whereupon the plaintiffs obtained an order for an execution to take the body. The execution was issued and the defendant arrested; he then applied to a Judge for his discharge. The Judge recommended a settlement, and the defendant gave and the plaintiffs accepted a promissory note for the amount due, payable on demand, with interest, and the defendant was discharged. In an action upon the note it was held by the full Court that there was a consideration for it, in the forbearance of the plaintiffs to press for a remand under the Act, and

that the note was not illegal for duress or other cause. It was contended that the original order of 1896 was void because the defendant was a salaried officer of the government of Canada, and that the payment of instalments would encroach upon that salary; but the Court knew "of no principle which would prevent an examiner under the Collection Act from making an instalment order in the case of a government official, where that course would not result in depriving him of being able to live on the salary, and thus impair his usefulness as such servant."

Jurisdiction of Justice's Court.]—There may be many cases in inferior tribunals in which an aggrieved party may resort either to appeal or to certiorari. Both are open to him, and sometimes it is difficult to say which is the more appropriate. In Slipp v. Morris (N.S.), 2 E. L. R. 218, the plaintiff sued in a justice's court to recover a small sum; the defendant appeared and raised the point that the case was not within R. S. N. S. c. 160, s. 1, in that the cause of action did not arise within the county in which the magistrate was acting, and the defendant did not reside there. The magistrate, however, entertained the plaint, and gave judgment for the plaintiff for part of his claim. The defendant appealed to the County Court under s. 35 of the Act, which provides that any party dissatisfied with the judgment of the justice may appeal therefrom to the County Court. The County Court Judge tried the case on the merits, hearing all the evidence, and then the defendant raised the question of the justice's jurisdiction. The Judge was of opinion, as was plain, that the magistrate had no jurisdiction, but dismissed the appeal because he thought certiorari was the proper remedy. The defendant then appealed to the Supreme Court of Nova Scotia, where it was held that the magistrate should have dismissed the action for want of jurisdiction, and, he not having done so, that the County Court Judge should have made the order that should have been made below; and, he not having done

so, the appeal was allowed, and the action dismissed with costs to the defendant throughout.

Master and Servant.]—By R. S. N. S. 1900 c. 19, s. 27, a statutory provision taken from one of the English Truck Acts, the wages or salary of any person employed in a coal mine are not to be paid otherwise than in money current in the Dominion of Canada, and a mine owner who contravenes the enactment is made liable to conviction and penalty. Provision is made for the employer applying the wages of an employee in liquidation of his debts in certain exceptional circumstances. In Rex v. Dominion Coal Co. (N.S.), 2 E. L. R. 267, the defendants were convicted of an offence against the Act in keeping back the wages of a miner, for which they gave him credit on a contra account. The miner was himself the prosecutor. The conviction was affirmed by a County Court, and the defendants appealed to the Supreme Court of Nova Scotia en banc. It was held: (1) that the appeal lay; (2) that the defendants were within the provision respecting the penalty and liable therefor; (3) that the penalty was enforceable against an incorporated company under the Summary Convictions Act; but (4) that the penalty should not be paid to the person aggrieved, a statutory provision in that behalf having been repealed before the information was laid.

Mortgage.]—In Nova Scotia a mortgagee may obtain all relief in respect of his mortgage debt by one action, and may include a claim on the covenant for payment when seeking foreclosure. If the mortgagee does not take this course, but brings an action upon the covenant to recover the deficiency after a sale under the decree for foreclosure or sale, in the first suit, he should not be allowed costs of the second action, but there is no authority or sound reason for the proposition that when a foreclosure suit has been brought and no claim for deficiency included, the mortgagee is to be debarred from seeking the deficiency

by an action on the covenant: McNeil v. O'Connor (N.S.), 2 E. L. R. 288.

Municipal Corporation.]—It was decided in In re Mack (N. S.), 1 E. L. R. 222, noted 26 C. L. T. 659, that the defendant in Rex v. Mack (N.S.), 2 E. L. R. 263, was not a ratepayer of the town of Liverpool, although he had been elected a town councillor. It is now held by the full bench of the Supreme Court, upon an information in the nature of a quo warranto filed pursuant to the decision in the earlier case, that the disqualification was a continuing one and the defendant not entitled to sit, and that his seat was properly attacked by quo warranto and not by petition under the Municipal Controverted Elections Act.

Preference.]—In McKinnon v. Coffin (P.E.I.), 2 E. L. R. 176, two points were decided by Fitzgerald, J., under the Assignments Act, 61 V. c. 4, as amended by 6 Edw. VII. c. 11. The plaintiff having attached certain moneys coming to the defendant (a physician) from an insurance company, the latter suggested the interest of the defendant's father under an assignment from the defendant of the moneys attached, executed before, but less than 60 days before, the commencement of the garnishing proceedings. The assignee having appeared and stated the nature of his claim, the Judge before whom the garnishing proceedings were taken found that the assignment was given for valuable consideration, but that at the time the defendant executed it he was insolvent. The amending Act eliminates the question of the assignee's knowledge of or concurrence in the intent of the assignor, and also the assignee's knowledge of the assignor's insolvency. Under the provisions of that Act this assignment given by a person when in insolvent circumstances, within 60 days of proceedings taken to impeach it, would be presumed to be null and void as against creditors. In the 1st section of the Act it is enacted that the word "Judge" in the Act "means

a Judge of the County Court of the county in which the debtor or person in insolvent circumstances has a chief place of business." Upon this was based an argument that only persons in business came within the statute; but, Fitzgerald, J., while he thought the language unfortunate, was of opinion that it had not the effect of limiting the operation of the Act, which in every other clause shewed an intention of including every person within its provisions. The other point ruled was, that the garnishing was a proceeding taken to impeach or set aside the assignment within the meaning of the statute; as to which see Re Perras v. Keefer, 22 O. R. 672.

Sale of Goods.]—Thompson v. Cameron (N.S.), 2 E. L. R. 192, was an action for the price of a cash register sold by the plaintiff to the defendant. The trial Judge found that the register did not contain a device which the defendant in ordering it regarded as essential, and that it was defective in its operation and unreliable as a cash register. The full Court held that the defendant could not use the article, even as a cash box, from December, 1904, until April, 1905, when the action was begun, and still claim the right to reject it as not fulfilling the contract. "We must judge of men's intentions by their acts, and not by expressions in letters which are contrary to their acts:" per Lord Abinger in Chapman v. Hopkins, 11 M. & W. There was no warranty, but the Court held that, even in the absence of a warranty, the plaintiff could recover only the actual value of the article sold, in accordance with the opinion expressed in the latest edition of Benjamin on Sales, p. 624. Russell, J., accepted this result somewhat grudgingly, evidently preferring the contrary doctrine of the New York cases Studer v. Bleistein, 5 L. R. A., and Copley Iron Co. v. Pope, 108 N. Y. 232, and adding: "Whether this result proceeds upon the theory of a new implied contract, or upon the footing of damages in this way awarded to the defendant for the breach of an implied

condition which on the passing of the property has sunk to the level of a warranty, is immaterial."——The majority of a Court of three Judges in Barnes v. Waugh (N.S.), 2 E. L. R. 221, held that the plaintiff was entitled to recover the price of fifteen barrels of oysters shipped to the defendant at Halifax by the plaintiff from Buctouche, New Brunswick. The oysters were shipped f.o.b. at Buctouche, and the defendant paid the freight. It was found that the oysters were in a merchantable condition when they were delivered on board the cars at Buctouche, but not so when they arrived at Halifax. The defendant contended that the law required that the oysters must be merchantable when received at Halifax, and relied on Beers v. Walker, 46 L. J. C. P. 677. "In this case," said Graham, E.J., delivering the judgment of the majority, "I am of opinion, as the trial Judge has found, that the oysters were delivered to the defendant when they were shipped at Buctouche. . . . The oysters were alive and unfrozen when they were shipped. . . . The oysters could only have reached the condition described by an exceptional or accidental cause, that is, by being frozen in transit and not being kept frozen. Nothing but an exceptional cause could have killed them all, and they could not pass from a condition of life to such a condition of decomposition, except through the intervention of frost. That would be held to be an exceptional thing." These considerations distinguished the case from the one relied on. The dissenting Judge was of opinion that the oysters were not merchantable unless they were suited to stand the journey to the buyer, and be merchantable for a reasonable time thereafter.

EDITORIAL REVIEW.

Judges of Provincial Courts.

A bill has been introduced into the Dominion House of Commons by Mr. Haughton Lennox, M.P., amending s. 7 of c. 31 of the statutes of 1905, by providing that Judges of Provincial Courts shall not act as arbitrators or referees, and also by requiring every Judge to keep a record and make an annual return to the Department of Justice of the "judicial acts and duties" performed by him. We are in sympathy with the first proposal, the result of which, if adopted, would be to free Judges altogether from outside burdens and influences; but we fail to perceive how benefit can be derived from the second amendment.

Judicial Changes in Quebec.

Sir Alexander Lacoste has resigned the Chief Justiceship of the Court of King's Bench, Quebec, and has been succeeded by Mr. Justice Henri T. Taschereau, who comes of a family of Judges and jurists. He was born at Quebec in 1841, educated at the seminary in that city and at Laval University, and was called to the Bar in 1863. While a student at Laval he published Les Debats, a paper in which the first attempt was made to give verbatim reports of the French speeches in the legislature. Later he acted as one of the editors of La Tribune. Mr. Taschereau was active in politics in Quebec prior to confederation, but did not enter Parliament until 1872, when he was returned to the House of Commons as Liberal member for Montmagny. He held his seat until 1878, when he was elevated to the Bench as a puisne Judge of the Superior Court of Quebec. He has resided in several judicial districts in the province, his last term having been spent in Montreal, where as head of the Court of King's Bench he will continue to reside.

Judge Charbonneau has been appointed to succeed Judge Taschereau at Montreal; Mr. Bruneau, M.P., to succeed Judge Charbonneau in Richelieu; and Mr. P. Gedeon Martineau to succeed the late Judge Madore in St. Hyacinthe.

Sir Louis Jette.

Sir Louis Jetté, Lieutenant-Governor of Quebec, was presented with an address on the 2nd February at the court house at Montreal, on the occasion of the fiftieth anniversary of his admission to the practice of law. It was exactly fifty years ago that Sir Louis Jetté was received as an advocate in the court house in Montreal, and the Bar wished to celebrate the event in a fitting manner.

Room 24 at the court house, where the presentation took place, was filled to its capacity, many ladies being in attendance. Among those present were Sir Alexander Lacoste, Chief Justice Taschereau, Chief Justice Sir Melbourne Tait, Mr. Justice Lavergne, Mr. Justice Trenholme, Mr. Justice Dunlop, and a number of other representatives of the Bench and many members of the Bar.

In the evening a dinner was given in honour of the Lieutenant-Governor at the Place Viger Hotel, and was most successful.

Death of Judge Horne.

Judge C. R. Horne died suddenly at his home in Windsor on the 2nd February. Although he had not been in his usual health for several days, nothing serious was apprehended, and he attended to his duties as usual up to the day before his death, which came shortly after 6 o'clock in the form of an attack of pericarditis. The deceased was senior Judge of the Essex County Court, to which position he was appointed in 1883. He was 70 years of age.

The Hamilton Law Association.

The annual meeting of the Hamilton Law Association was held in the Law Library on the 8th January, 1907.

The trustees' 27th annual report, for 1906, shews a membership of 68, and a library of 4,363 bound volumes, of which 99 were added during the year. The library is kept insured for $8,800.

The Wentworth Historical Society has offered to the association for safe-keeping the original commission to Thomas Taylor, Judge of the District Court of the District of Gore, which offer has been accepted, and the commission will be framed and hung in the library. The annual report for 1906 of the Inspector of County Libraries refers to the association as follows: "This library as usual requires no special mention, as its efficiency is well known; 126 volumes have been added since my last inspection, and the librarian has commenced an index of cases involving decisions on Rules of practice. Cases on the statutes are added to Mr. Holmested's work. . . . The books of the officers are properly kept."

On the 5th March, 1906, Mr. Justice Mabee held his first sittings of the High Court in Hamilton. A complimentary dinner was given to him on the 12th March, 1906, by the members of the Bar, and was very largely attended.

At the quinquennial election of Benchers, 1906, Messrs. A. Bruce, K.C., J. W. Nesbitt, K.C., and George Lynch-Staunton, K.C., were elected after nomination from this association.

In the past year the hand of death has removed from the ranks of this association two of its most prominent members: Francis MacKelcan, K.C., the president, at the time of his death, of the association, and Henry Carscallen, K.C., M.P.P. Resolutions were passed which place on record the profound regret of the trustees and members of the association.

Upon the death of Mr. MacKelcan, Mr. E. D. Cahill was elected to fill the vacancy on the board; Mr. S. F. Lazier, K.C., was elected president of the association, and Mr. William Bell, vice-president, at a special meeting of trustees called for that purpose.

The following officers were elected for 1907:—

President—S. F. Lazier, K.C.

Vice-President—William Bell.

Treasurer—Charles Lemon.

Secretary—W. T. Evans.

Trustees—T. C. Haslett, Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., P. D. Crerar, K.C., E. D. Cahill.

The Hastings Law Library Association.

The Hastings Law Library Association held its annual meeting in the library on the 4th February, and after the ordinary business the following officers were elected:—

J. Parker Thomas—Hon. President.

W. N. Ponton—President.

E. J. Butler—Vice-President.

W. Jeffers Diamond—Secretary.

W. S. Morden—Treasurer.

W. C. Mikel—Curator.

Trustees—J. F. Wills, F. E. O'Flynn, E. G. Porter, M.P., W. B. Northrup, K.C., M.P., and S. Masson.

Auditors—A. A. Roberts and P. J. M. Anderson.

Librarian—Miss Lillian McRae.

The Retirement of Judges.

Among the autograph letters of which there will be a sale in the near future by Messrs. Sotheby, Wilkinson, and Hodge, is included a letter written in 1813 by Lord Ellenborough, who was then Lord Chief Justice of England, to

Lord Chancellor Eldon, which contains the following piquant passage in reference to judicial pensions: "If it is a matter of public policy, as I think it is, to hold out an adequate inducement to puisne Judges to retire in time, the same policy, I think, holds in a greater degree in respect of the chiefs, to say nothing of the Chief Justiceship of the King's Bench; but I have lived to see one of the greatest men of my time—I mean Lord Mansfield—hold that office a year or longer at the least than those who admired and esteemed him would have wished him to do." Lord Ellenborough's opinion that the inducement to Judges to retire in time should especially apply to the Chief Justice of the King's Bench was adopted, since the retiring pension, after fifteen years' judicial service, is, in the case of a Chief Justice of the King's Bench, who has held that office for fifteen years, not two-thirds, but six-sevenths of his judicial salary. It cannot, however, be seriously questioned that, notwithstanding the adequacy of the pensions, retirement from the Bench is still postponed to a period far beyond the limit of a useful and dignified stay on the Bench. In the middle of the last century, in Ireland, Mr. Thomas Lefroy occupied the position of Chief Justice of Ireland after he had entered on his ninety-first year, when his eldest son, a member of the House of Commons, had been exempted on the ground of age and infirmities from serving on Parliamentary Committees; and instances not a few arise in the recollection of cases in recent years in which the retention of judicial office, having regard to advancing years and physical and—in one painful instance—mental debility, was not compatible with the interests of justice or the respect due to the judicial office. (*The London Law Times.*)

A New Scottish Judge.

In Edinburgh, on the 22nd January, Mr. Charles J. Guthrie, K.C., in the presence of a full bench of Judges,

presented to the Lord President His Majesty's commission appointing him a Senator of the College of Justice, and, after "passing his trials," took possession of the seat rendered vacant by the resignation of Lord Kyllachy, with the title of Lord Guthrie.

The Master of the Rolls on the Duty of Reporters.

The duty of a reporter in his relation to the public was the important question for decision in the case of Hope v. Sir W. C. Leng and Co. Limited, which came before the Court of Appeal on the 18th January, on the appeal of the defendants. The action was brought by Mrs. H. A. Hope, wife of Mr. J. H. Hope, formerly of Workington, to recover damages for an alleged libel, stated to have been contained in a report of certain County Court proceedings which appeared in the Sheffield Daily Telegraph, belonging to the defendants. The County Court proceedings were brought by Mr. Muir Wilson, solicitor, to recover money alleged to be due by Mrs. Hope for professional services. The defendants published a report of the proceedings, and Mrs. Hope alleged that this was inaccurate, and that certain material facts which told in her favour were omitted from the report. At the trial, before Mr. Justice Grantham, the jury awarded Mrs. Hope £100 damages, and Sir W. C. Leng and Co. now appealed, contending that there was no evidence upon which the jury could properly find that the report was unfair and inaccurate.

The Master of the Rolls, in the course of his judgment, said that in the Court below Mr. Justice Grantham put before the jury, in a way upon which he (the Master of the Rolls) could not attempt to improve, the position of a reporter on a daily newspaper, whose function it was to give a fair report, the report coming not necessarily from the hand of a trained lawyer, but from a person whose function it was to send that report in so that the public might read it next morning. All these considerations ought to be taken

into account, as the learned Judge pointed out to the jury, when they were dealing with the question of whether the report was fair from the standpoint of the person who wrote it. The learned Judge said: "I think juries would be very wrong if they were to be too severe on them (reporters) if there happens to be some slight flaw. If there is something which you think would have been better put in a different way, but if in the main it is an accurate report, and you do not think it would do any harm to the parties, I think the jury should protect them (reporters) by saying that they fail to see that it has been proved that the account is not a fair and accurate report of what took place in a court of justice." He (the Master of the Rolls) quite agreed with the view the learned Judge took. Was there evidence fit for the consideration of the jury—evidence upon which reasonable men might find this report was not fair? The learned Judge was thoroughly dissatisfied with the verdict, and he (the Master of the Rolls) was not satisfied with it himself. But that would not justify the Court in entering judgment for the defendants, if there was evidence fit to be considered by a jury. Therefore, the real question to be decided was, "aye or no," was there evidence upon which a reasonable jury, properly directed, could find that this report was unfair so as to make it actionable? He came to the conclusion that there was really no evidence fit to be considered by the jury on that point. Mr. Justice Grantham was perfectly right, both in his opinion formed upon the evidence and in the direction which he gave to the jury. The verdict was not one which any reasonable jury could reasonably have come to, and on this ground the Court was not only justified but bound to set aside the verdict, and enter judgment for the defendants.

Lords Justices Cozens-Hardy and Fletcher Moulton concurred, and the appeal was allowed, and judgment entered for the defendants, with costs in that Court and below. (*The London Law Times.*)

Litigants and Insurance.

An announcement was solemnly made before Mr. Justice Darling and Mr. Justice Phillimore on the 17th January that there are in existence companies which insure litigants against a successful appeal by the other side, and that these companies even offer different rates for different Judges. These statements, made during the hearing of a case on appeal, open up quite a new vista of possibilities in the conduct of litigation. They may be taken as signifying that, if you have a doubtful case, you may not only take out an insurance policy to safeguard you against the risks of the ultimate decision, but you may go further and have your premium regulated according to the mental calibre and legal acumen of the original Judge and the chances which attach to the reversal of his judgment on appeal.

A representative of the Morning Post who pursued inquiries in this novel and interesting arena of the business of insurance was assured by a gentleman of eminence in the world of insurance that the observations made in open court must really be treated as a forensic joke. "Of course," he said, "insurance business is growing in every department. The older companies stick to fire and life, but you have companies like the Ocean which embark on burglary and various other forms of insurance. There is a big field, particularly in the burglary line, and burglary and cognate subjects are destined to grow and spread in the future. But you may take it from me that no company in existence has insurance against litigation in its books as part of its regular business, and that there is no opening for anything of the kind. Insurance of this character could only tend to promote litigation, and lessen the sense of individual responsibility on the part of the litigants. It may be that some such business is done by underwriters at Lloyd's—they do most things in the way of risks at Lloyd's—but to suggest that there is anything in the nature of a general traffic in risks of litigation is absurd."

Captain E. F. Inglefield, the secretary of Lloyd's, informed our representative that he had seen the statements made in court, "but," he remarked, "I authorize you to say that no business of the kind such as has been mentioned is regularly transacted at Lloyd's. When I read the statement I regarded it as merely a playful display of humour on the part of the counsel. Lloyd's underwriters, it is true, undertake all kinds of risks, and there may be some instances in which insurance against the result of actions-at-law are undertaken; but there is no general system, and you must bear in mind that, while our underwriters are independent, all their business has to be done through brokers, such as on the Stock Exchange."

A Lloyd's underwriter admitted that within his knowledge risks against judgments in the Court of Appeal had been accepted. Such cases were, however, he said, altogether exceptional, and they constituted a class of business for which no schedules existed, and the risks of which were wholly exceptional. He scoffed at the idea that where cases of this kind have occurred there is a differentiation among Judges. "Really," he remarked, "the cases within my knowledge are so few as not to be worth repeating. There may be wise and there may be foolish Judges, but in accepting lists we put them in the lump. At Lloyd's we are always ready to accept risks in all sorts of cases. We are willing to insure a married couple against the gift to them of twins, just as we insure a football club against the risk of loss on a match because of bad weather. In our climate the weather is always a fair risk, and it is one of the most common of our insurances." (*The Morning Post.*)

The American Bar Association.

The annual meeting of the American Bar Association will be held at Portland, Maine, on Monday, Tuesday, and Wednesday, the 26th, 27th, and 28th August, 1907. The International Law Association may hold their meeting in

America this year, and the suggestion has been made that they should convene on the last three days of the same week.

According to His Folly.

The present Chief Justice of the Common Pleas, Ontario, Sir William Meredith, was for many years engaged in the practice of criminal law, and afterwards became a notable figure in provincial politics, as leader of "Her Majesty's Loyal Opposition" in the Ontario legislature. He is a man of fine presence, with a leonine mass of hair. One night he was speaking in Toronto at a turbulent meeting held toward the close of a hot campaign, when he was sharply interrupted by a strident voice from the top gallery:

"Aw, Willum, go an' get your hair cut!"

Instantly Meredith threw back his magnificent head, and, fixing the offender with the stern eye of the practised examiner, exclaimed:

"My friend, if my memory serves me, I once had something to do with getting your hair cut."

There were no more interruptions.

The Green Bag gives this story, originally published in Lippincott's Magazine.

An Amusing Preamble.

In the preface to the 4th edition of Mr. Craies's work on Statute Law (noticed post p. 146) will be found the following humorous reference to a statute passed by the Imperial Parliaments (35 Geo. III. c. 100):—Parliament is said to be omnipotent, and that it is capable of dealing with curious matters will be seen from the subjoined specimen of an eighteenth century preamble: "And whereas it has been customary for the Rector of the Parish of Eckington aforesaid for the time being, to keep and maintain a Boar for the Use and Benefit of the said Parish. And whereas an Organ has lately

been erected in the Parish Church of Eckington aforesaid, and no Annual Salary being provided for the Organist thereof, and the said Parishioners being desirous to abolish and set aside the aforesaid Custom, and to appropriate an Annual Money Payment to the Organist for the time being *in lieu thereof.*" The marginal note is: "Rector exempted from keeping a Boar, on payment of an Annual Sum to the Organist."

Anecdotes of Lincoln.

From "Lincoln as a Lawyer," by Jesse W. Weik, in "Lex," the new publication of the New York University School of Law, we quote the following anecdotes, which we do not remember to have seen before, though Lincolnisms abound in legal periodicals:—

Lincoln said of a certain technical Judge that he would hang a man for blowing his nose in the street, but that he would quash the indictment if he failed to state which hand he blew it with!

To a client in Kentucky who had asked Lincoln and Judge Logan, when they were in partnership, to care for and collect the rents accruing from a house and lot in Springfield, he wrote, in the name of the firm, declining, but blandly added: "We recommend that you give the charge of it to Mr. Isaac S. Britton, a trustworthy man and one whom the Lord made on purpose for such business."

Recent American Decisions.

Carriers.—Whether or not it is negligence for a passenger on a street car to permit his arm to project slightly beyond the side of the car is held, in Georgetown & T. R. Co. v. Smith (D. C. App.), 5 L. R. A. (N.S.) 274, to be a question for the jury.

Insurance.—A by-law of a fraternal insurance society which provides that, if any member heretofore or hereafter

adopted shall become intemperate in the use of drugs, the benefit certificate held by such member shall, by such acts, become and be void as to benefits, and all payments made thereon shall be thereby forfeited, is held, in Taylor v. Modern Woodmen of America (Kan.), 5 L. R. A. (N.S.) 283, not to apply to the case of a member who, prior to the enactment of such by-law, had become intemperate in the use of drugs, and continued so thereafter.

Libel.—A report by the proper official of the War Department to the Secretary of War as to the merits of a claim for a medal of honour for services of a soldier in an action which has been referred to him for investigation, which report contains nothing that does not relate to, or reflect upon, the character of claimant and the foundation of his claim, is held, in De Arnaud v. Ainsworth (D. C. App.), 5 L. R. A. (N.S.) 163, to be absolutely privileged, notwithstanding the motive which may have actuated the maker or the mistakes of fact which it may contain.

Negligence.—The operation of an automatic, push-button, electrical passenger elevator without an operator in an apartment building where several children under ten years of age live and use it, in a city in which the duty to employ an operator is imposed by ordinance, and the failure to discharge this duty is made a misdemeanour, is held, in Shellaberger v. Fisher (C. C. A. 8th C.), 5 L. R. A. (N.S.) 250, to constitute sufficient evidence of negligence, actionable by a child of five or six years of age, who is injured while running the elevator, to warrant the submission of the question of negligence to the jury.

Police and health ordinances regulating the case of city property are held, in Sullivan v. Huidekoper (D. C. App.), 5 L. R. A. (N.S.) 263, not to extend the liability of lot owners for injury to children trespassing on their property by reason of ponds left there in violation of the terms of the ordinance. With these cases is an extensive note reviewing

all the other authorities on violation of police ordinance as ground for private action.

Sunday.—The maker of a note is held, in Hale v. Harris (Ky.), 5 L. R. A. (N.S.) 295, not to be able to defeat payment because it was delivered on Sunday, unless he surrenders the consideration received for it.

That in gathering a crop it is somewhat less expensive and more convenient to work seven days in the week than six is held, in Com. v. White (Mass.), 5 L. R. A. (N.S.) 320, not to make such work one of necessity, within the meaning of a statute making it unlawful to do on the Lord's Day any work except works of necessity.

Will.—A life estate, and not a fee, is held, in Haviland v. Haviland (Iowa), 5 L. R. A. (N.S.) 281, to be given to testator's wife by a provision in his will giving her his property "for her exclusive use and benefit during her life," and after her death whatever remains to be divided among testator's children.

A devise of testator's property to his wife, "to be hers absolutely," is held, in Moran v. Moran (Mich.), 5 L. R. A. (N.S.) 323, to vest in her a fee; and a subsequent clause "providing that if, at her death, any of the property be still hers," then the residue "shall go to my heirs," is held to be void for repugnance.

POOREST PAID BAR.

To the Editor of the Canadian Law Times:

Sir,—Mr. Justice Riddell is reported as saying at the dinner of the Osgoode Legal and Literary Society "that the Bar of Ontario is the poorest paid Bar of any English-speaking country." There may be a ray of hope in this for the poverty stricken of this ancient and honourable profession; for to have an evil recognized is one step towards the remedy. That remedy may not come from the astute politician. Practitioners might help themselves, and help each other, more than they do. I will point out one way. Nearly every lawyer is a notary public. In the United States these officials take examinations and references in pending actions, receiving of course proper fees therefor. Why should not that system be adopted here—at all events in localities where there is no local Master or special examiner? In a country town in this province recently, examination for discovery was required in a High Court action. The Toronto solicitors in the case arranged to have it taken before the police magistrate for the town (who never was a lawyer), while there are several legal notaries in the same town, any one of whom would gladly undertake such work and do it intelligently and efficiently. The Bar Association would do well to appoint a committee to ascertain in what way the emoluments of the profession might be legitimately increased, and use its influence accordingly.

Yours, etc.,

BARRISTER.

January 25th, 1907.

BOOK NOTICE.

Craies on Statute Law:—A Treatise on Statute Law, with Appendices containing Words and Expressions used in Statutes which have been judicially or statutably construed, the popular and short Titles of certain Statutes, and the Interpretation Act, 1889, by William Feilden Craies, M.A., of the Inner Temple and Western Circuit, Barrister-at-law; Founded on and being the fourth edition of Hardcastle on Statutory Law. London: Stevens and Haynes: 1907.

This edition is accurately described as above. Many persons will still prefer to speak of Hardcastle, but this is in reality Craies founded on Hardcastle. So much of the valuable material of the original edition as has been preserved in the present text is included in square brackets. Two new chapters have been added in Book II., dealing more fully with subordinate legislation (c. 3, p. 256) and colonial legislation (c. 9, p. 399). Reference has been more freely made to colonial decisions, which, says the author, are yearly growing in importance. At the end of appendix C. (p. 625) is given a list of Colonial Interpretation Acts. We have looked at most of the citations of Canadian cases, and find that they do not go beyond the Judicial Committee and the Supreme Court of Canada—but perhaps more could not be expected. We hope to see the decisions of our provincial courts noted in the next edition. This one may safely be commended to the Canadian lawyer as a valuable text-book.

PERIODICALS AND PAMPHLETS.

James Wilson Patriot and the Wilson Doctrine, by Lucien Hugh Alexander, of the Philadelphia Bar; reprinted from the North American Review; in pamphlet form.

Lex (School of Law, New York University, February, 1907.) This is a new monthly, containing "Lincoln as a Lawyer," by Jesse W. Weik; "The Tattler;" "When a Woman Enters Law," by Frieda Thomas; "Cross-examination," by Emanuel F. Wohlvert; and a good deal of interesting miscellaneous matter.

Green Bag (Boston, January and February, 1907):—"James Wilson—Nation-Builder," by Lucien Hugh Alexander; "The Lawyer's Patron Saint," by Lewis M. Miller; "The Modern Conception of Animus," by Brooks Adams; "New England Town Law," by Henry Ware; "The Segregation of Japanese Students by the School Authorities of San Francisco," by Charles C. Hyde; "Mr. Justice Moody," by Herbert Parker; "Constitutional Aspects of Employers' Liability Legislation," by Ernst Freund; "The Mercy of the Court of Burgomasters and Schepens," by Lee M. Friedman; "A Question of Ratification in Insurance Law," by Frederick T. Case.

Harvard Law Review (February, 1907):—"Crucial Issues in Labour Litigation," by Jeremiah Smith; "The Income Tax and the Constitution," by Edward B. Whitney; "The Right of Bailees to Contract against Liability for Negligence," by Hugh Evander Willis.

American Law Review (St. Louis, Mo., January-February, 1907):—"Long-haul Legislation and Law-writing," by Charles E. Grinnell; "Economic Forces and Municipal Law;" "A Legal Fiction with its Wings Clipped," by Simeon E. Baldwin; "The Study of Roman and Civil Law," by William Wirt Howe; "The Standard Oil Anti-Trust Complaint," by Richard W. Hale; "Judicial Dispensation from Congressional Statutes," by William Trickett; "Spheres of Influence and Protectorates." by Hannis Taylor; "The Congo Free State," by Hannis Taylor.

Columbia Law Review (February, 1907):—"Schooling Rights under our Treaty with Japan," by Simeon E. Baldwin; "Possible Federal Trust Legislation," by Walter C. Noyes; "A Historical Sketch of Mohammedan Jurisprudence," by Abdur Rahim.

Michigan Law Review (February, 1907):—"Isaac Peckham Christiancy," by Joseph B. Moore; "The Monroe Doctrine—its Status," by John F. Simmons; "The Interstate Commerce Clause and State Control of Foreign Corporations," by Frank E. Robson.

Case and Comment (Rochester, N.Y., January, 1907):—"Views of the Governors;" "The Federal Fellow-Servant Law;" "Public Authority for Private Nuisance;" "Legislative Protection of Gambling;" "A Crusade against Vice;" "Civil Remedy of Federal Government to Enforce Treaty;" "Invalid Treaties Violating State Rights;" "International Rivers."

Canadian Municipal Journal (Montreal, December, 1906):—"Police for Rural Districts;" "Road Building;"

"Fire Protection for Towns and Villages;" "Cornwallis's Experience with Municipal Hail Insurance;" "Provincial Hail Insurance;" "Municipal Institutions, their Value and Trend;" "The Telegraph Question;" "Is the Public Ownership of Public Utilities an Advantage to the People?" "Rural Telephones in Yorkton;" "Cement Walks."

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OCCASIONAL NOTES.

Supreme Court of Canada.

EXCHEQUER COURT.] [15TH NOVEMBER, 1906.

DODGE v. THE KING.

Expropriation of land—Payment—Market value—Potential value—Evidence.

D. purchased at different times and in 16 different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown, on expropriating the land, offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The Referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed.

Held, reversing the judgment of the Exchequer Court, 10 Ex. C. R. 208, GIROUARD, J., dissenting, that there was no user of the land nor any special circumstance to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation. D. claimed the larger price as potential value of the land for orchard purposes, to which he had intended to devote it.

Held, that, as he had not proved the land to be fit for such purpose, and the evidence tended to disprove it, he could not receive compensation on that ground.

By 2 Edw. VII. c. 9, s. 1, only 5 expert witnesses can be called by either side on the trial of a case.

Quaere, if more are called without objection by the opposite party, is the testimony of the extra witnesses valid?

Roscoe, K.C., for the appellant.

E. L. Newcombe, K.C., and *MacIlreith,* for the respondent.

EXCHEQUER COURT.] [11TH DECEMBER, 1906.

PAUL v. THE KING.

Negligence—Navigation of inland waters — Collision — Government ships and vessels—"Public work"—Exchequer Court Act, s. 16 —Construction of statute—Right of action.

His Majesty's steamship "Champlain," while navigating the river St. Lawrence at some distance from a place where dredging was being carried on by the government of Canada, and engaged in towing an empty mud-scow, owned by the government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam-barge, which was also navigating the river, and the barge sustained injuries.

Held, affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of negligence of officers or servants, as the injury had not been sustained on a public work, within the meaning of s. 16 of the Exchequer Court Act.

Chambers v. *Whitehaven Harbour Commissioners,* [1899] 2 Q. B. 132, *Hall* v. *Snowdon, Hubbard, & Co., ib.* 136, and *Lowth* v. *Ibbotson,* [1899] 1 Q. B. 1003, referred to.

Mignault, K.C., and *Martineau,* K.C., for the appellant.

E. L. Newcombe, K.C., and *Decarie,* K.C., for the respondent.

EXCHEQUER COURT.] [26TH DECEMBER, 1906.

THE "ARRANMORE" v. RUDOLPH.

Ship—Collision—Violation of rules not affecting accident— Steering wrong course.

The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the

local Judge, unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous.

The "Picton," 4 S. C. R. 648, followed.

A steamer coming up Halifax harbour ran into a schooner, striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow, and the latter starboarded her helm to pass astern, and then ported. He then was so close that he stopped the engines, but too late to prevent the collision.

Held, that though under the rules the schooner should have kept her course, and also was to blame for not having a proper look-out, neither fault contributed to the collision.

Judgment of the Court below affirmed.

Harris, K.C., and *Mellish,* K.C., for the appellants.

W. B. A. Ritchie, K.C., for the respondents.

ONTARIO.] | 8TH NOVEMBER, 1906.

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Appeal—Action for declaration and injunction—60 & 61 V. c. 34, s. 1 (d).

The Act 60 & 61 V. c. 34, s. 1 (d), relating to appeals from the Court of Appeal for Ontario, does not authorize an appeal in an action for a declaration that a municipal by-law is illegal and for an injunction to restrain its enforcement.

A by-law providing for a special water rate for certain industries does not bring in question the taking of an annual or other rent, custom or other duty or fee, under clause (d).

Appeal from judgment of Court of Appeal in *Hamilton Distillery Co.* v. *City of Hamilton, Hamilton Brewing Association* v. *City of Hamilton,* 12 O. L. R. 75, quashed.

G. T. Blackstock, K.C., and *H. E. Rose*, for the appellants.

G. F. Shepley, K.C., and *W. Bell*, for the respondents.

WABASH R. W. CO. v. MISENER.

Railway—Negligence—Injury to person crossing track—Findings of jury—"Look and listen"—Contributory negligence.

M. attempted to drive over a railway track which crossed the highway at an acute angle, where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing, when he could have seen an engine approaching, which struck his team, and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given, and a verdict was given for the plaintiffs and affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, 12 O. L. R. 71, *Misener* v. *Wabash R. W. Co.*, Fitzpatrick, C.J., *haesitante*, that the findings of the jury were not such as could not have been reached by reasonable men, and the verdict was justified.

H. E. Rose, for the appellants.

W. M. German, K.C., for the respondents.

ONTARIO.] [11TH DECEMBER, 1906.

HAMILTON STREET R. W. CO. v. CITY OF HAMILTON.

Street railways—Contract with municipality—Use of streets—Payment for—Percentage of receipts—Traffic beyond city—Validity of agreement.

By agreement between the city of Hamilton and the Hamilton Street Railway Co. the latter were authorized to con-

struct their railway on certain named streets, and agreed to pay to the city, *inter alia,* certain percentages on their gross receipts.

Held, following *Montreal Street R. W. Co.* v. *City of Montreal,* [1906] A. C. 100, that such payment applied in respect to all traffic in the city, including that originating or terminating in the adjoining township of Barton.

Held, also, that, as when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic, and not on the portion within the city only.

Held, further, that the power of the company to construct their railway was not derived wholly from their charter, but was subject to the permission of the city corporation; the city had therefore a right to stipulate for payment of such percentages, and the agreement therefor was *intra vires.*

Judgment of the Court of Appeal in *City of Hamilton* v. *Hamilton Street R. W. Co.,* 10 O. L. R. 575, affirmed.

E. D. Armour, K.C., and *W. Nesbitt,* K.C., for the appellants.

G. T. Blackstock, K.C., and *H. E. Rose,* for the respondents.

QUEBEC.] [19TH NOVEMBER, 1906.

COTE v. RICHARDSON.

Appeal—Intervention—Amount in controversy.

In an action in the province of Quebec to recover $804.49, a writ of attachment before judgment issued at the same time as the writ of summons, and goods in possession of the defendant, of the value of $4,000, were provisionally attached. The respondent company subsequently intervened in the action, claiming the goods thus attached. The judgment maintained the plaintiff's action, quashed the attachment, maintained the intervention, and declared that the company were

owners of the goods. On motion to quash an appeal by the plaintiff:—

Held, GIROUARD, J., dissenting, that the intervention was a "judicial proceeding" within the meaning of s. 29 of the Supreme and Exchequer Courts Act, and that the right of appealing to the Supreme Court of Canada was determined by the matter in controversy upon the intervention.

Turcotte v. *Dansereau,* 26 S. C. R. 578, and *King* v. *Dupuis,* 28 S. C. R. 388, followed.

Atlantic and North-West R. W. Co. v. *Turcotte,* Q. R. 2 Q. B. 305, *Allan* v. *Pratt,* 13 App. Cas. 780, and *Kinghorn* v. *Larue,* 22 S. C. R. 347, distinguished.

Motion to quash dismissed.

Flynn, K.C., for the appellant.

Stuart, K.C., and *Garneau,* K.C., for the respondent.

QUEBEC.] [22ND NOVEMBER, 1906.

QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. THE KING.

Crown—Purchase of debentures—Illegal purpose—Breach of trust.

In an action by the Crown to recover interest due upon debentures purchased by the government of the late province of Canada, with moneys belonging to the common school fund (of which the Crown is trustee) from the Quebec North Shore Turnpike Road Trustees, the defendants pleaded that the debentures could not be lawfully held or recovery had thereon, inasmuch as the advisers of the Crown, at the time of their purchase, were aware that the debentures had been issued in breach of trust, and their proceeds misapplied towards payment of interest on other debentures due by them.

Held, that, as there was statutory authority for the issue of the debentures in question, knowledge of any breach of trust, or misapplication of moneys in respect thereto, by such

advisers of the Crown, could not be set up by the defendants as a defence to the action.

Appeal dismissed with costs.

Lafleur, K.C., and *Stuart,* K.C., for the appellants.

G. F. Shepley, K.C., for the respondent.

QUEBEC.] [23RD NOVEMBER, 1906.

MOREL v. LEFRANCAIS.

Contract—License to cut timber—Description of land—Boundaries—Winding river—Ambiguity—Evidence.

A license to cut timber on lands traversed by a water-course described the portion on which the timber was to be cut as "bounded on the south" by the river. The river crossed the width of the land almost entirely at a point about seven arpents from its northern boundary, and again crossed it completely at another point about nineteen arpents further south.

Held, that there was no ambiguity in the description, but, even if any doubt existed, the language of the instrument must be construed literally, and the party bound thereby could not be allowed to give evidence of extraneous circumstances to shew a different intention.

Appeal allowed with costs.

C. E. Dorion, K.C., for the appellant.

L. P. Pelletier, K.C., for the respondent.

YUKON TERRITORY.] [11TH DECEMBER, 1906.

KLONDIKE GOVERNMENT CONCESSION LIMITED v. McDONALD.

Mining lease—Hydraulic grant—Legislation—Riparian rights.

An hydraulic mining lease, granted in 1900, for a location in the Hunker Creek Valley, in Yukon Territory, extended

along both banks of the creek, and, subject to all subsisting rights, included a point at which, in 1904, the plaintiff acquired, under the Dominion mining regulations, then in force, the right to divert a portion of the waters of the creek, subject to then subsisting rights, for working his placer mining claims.

Held, that the hydraulic grant was governed by the provisions of the mining regulations in respect to the user of flowing waters, and conferred no priority as to privileges or riparian rights upon the lessee, whereby the plaintiff could be prevented from building dams and flumes for the diversion of the waters of the creek at the point mentioned, for the purpose of working his placer claims, as his grant was of a substantive user of those waters, and not subject to the common law rights of riparian owners on the stream.

Judgment of the Yukon Territorial Court affirmed.

J. S. Ewart, K.C., and *F. H. Chrysler,* K.C., for the appellants.

Auguste Noel, for the respondent.

IN CHAMBERS.

NORTH-WEST TERRITORIES.] [DAVIES, J., 1ST FEBRUARY, 1907.

REX v. GILBERT.

Criminal law—Crown case reserved—Extension of time for notice of appeal—Criminal Code, s. 1024—Order after expiration of time for service of notice—Jurisdiction.

The power given by s. 1024 of the Criminal Code, R. S. C. 1906 c. 146, to a Judge of the Supreme Court of Canada, to extend the time for the service on the Attorney-General of notice of an appeal in a reserved Crown case, may be exercised after the expiration of the time limited by the Code for the service of such notice.

Banner v. *Johnston,* L. R. 5 H. L. 157, and *Vaughan* v. *Richardson,* 17 S. C. R. 703, followed.

C. J. R. Bethune and *Balfour,* for the applicant.

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NATIONAL TRUST COMPANY

—LIMITED.—

HEAD OFFICE AND SAFE DEPOSIT VAULTS:

No. 18 TO 22 KING STREET E., TORONTO.

CAPITAL (Paid-up), $1,000,000. RESERVE, $450,000

BOARD OF DIRECTORS.

PRESIDENT:

J. W. FLAVELLE.

VICE-PRESIDENTS:

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HON. MR. JUSTICE BRITTON,
HON. GEO. A. COX,
GEO. H. WATSON, K.C.
CHESTER D. MASSEY,
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W. T. WHITE,
GENERAL MANAGER

THE
CANADIAN LAW TIMES.

MARCH, 1907.

IS ROLLING STOCK OF A RAILWAY REAL OR PERSONAL PROPERTY?

THE question as to whether the rolling stock of a railway is realty or personalty has been thrown into some confusion by the recent judgment of the Privy Council in Toronto R. W. Co. v. City of Toronto, [1904] A. C. 809.

This was an assessment case, and their Lordships decided that cars running upon a system of electric tramways are not liable to be taxed as "real estate" or as "fixtures," under the Assessment Act of Ontario.

But, whether the action in such a case is under an Assessment Act or is at the instance of judgment creditors executing against such cars, appears to make no substantial difference, for the Ontario Court of Appeal felt themselves bound by the previous decision of Bank of Montreal v. Kirkpatrick, 2 O. L. R. 113, which was an interpleader issue between execution creditors of an electric street railway company and trustees for debenture holders of the same property. Their Lordships of the Privy Council expressly disapproved of this case.

The Corporation of Toronto submitted that the cars were so actually or constructively affixed to land or buildings as to render them real property and assessable as such. The Privy Council could not "accede to the argument addressed to them, or adopt the reasoning of Mr. Justice Osler in Kirkpatrick's case without doing violence to the English language and to elementary principles of English law. It

did not appear to them to advance the argument to describe the appellant's system of electric traction as a great machine, or by any other metaphorical expression. The subject of assessment is not the appellant's system or undertaking, but only that part of it which can properly be described as real estate. The cars are no doubt adapted for use in connection with the railway and trolley wires, but *they are not part of the railway and are not fixed in any sense whatever to anything which is real estate.* Their Lordships cannot attach any legal meaning to the expression 'in the nature of fixtures,' or 'constructively affixed' except as an admission that the articles in question are not in fact fixtures or actually affixed. They are therefore of opinion that the cars remain and are personal estate only and are unassessable."

It will be noticed that their Lordships expressed two reasons for not regarding such cars as realty: first, because they are not part of the railway; second, because they are not fixed in any sense whatever to anything which is real estate.

In view of the fact that the Privy Council expressly disapproved of the holding in the Kirkpatrick case, it is not necessary to consider the question which arose in the Toronto case, regarding the effect of certain statutory declarations as to what constituted "land" for the purpose of assessment. The important question is whether at common law the rails of a street railway company are to such an extent a component part of the company's shops as to constitute them part of its real estate. For, as regards the highway on which the street railway's lines are run, their right in this is a mere easement, and anything attached to it for a permanency would not be a fixture under the English law: Wake v. Hall, 8 App. Cas. 195.

It is true that the Supreme Court have taken another view of this matter and have held that a gas company's mains are assessable as real estate, because the legislature in giving the company permission to lay its pipes in the streets at

certain places designated by the city surveyor, did something which was equivalent to a legislative grant of the land: Consumers' Gas Co. v. City of Toronto, 27 S. C. R. 453, following Metropolitan R. W. Co. v. Fowler, [1893] A. C. 416. And this case was followed by the Ontario Court of Appeal in the matter of the rails of a street railway company: Re Toronto R. W. Co. Assessment, 25 A. R. 135, 139.

It would appear, therefore, that at least the latter decision has been overruled by the Privy Council in the later Toronto Street Railway case. But whether the company occupying the substratum or the surface of the streets has an easement or an interest in the land amounting to a hereditament, depends upon the construction of the company's charter. See per Lord Herschell in Metropolitan R. W. Co. v. Fowler, [1893] A. C. at p. 422, approving Chelsea Waterworks v. Bowley, 17 Q. B. 358.

In the Kirkpatrick case, Mr. Justice Osler said, at p. 123: "Of the entire machine thus operated, important parts, the rails and power house, are unquestionably realty." This was evidently what their Lordships dissented from in disapproving of the reasoning in that case, as they said the cars are not fixed in any sense whatever to anything which is real estate. This sentence is capable of two constructions, i.e., either the rails of a street railway are not real estate, or, being real estate, the cars are not "fixed" to the same. The latter is apparently not their meaning, because they first say that the cars "are not part of the railway," and then go on to state that they are not fixed to anything which is real estate.

Therefore it may be taken as settled that, unless some peculiar or express wording of a charter should otherwise enact, the rails of a street railway company are not real estate.

The Quebec law has also been interpreted in the same sense as the above Ontario cases, and must also be regarded as overruled. In Quebec it has been held that the mains

of a gas company are appurtenant to its main buildings and assessable therewith: Sherbrooke Gas and Water Co. v. Sherbrooke, 15 L. N. 22; Lachute v. Stuart, 15 L. N. 29.

In Quebec, in order to give movable property the character of immovables by destination, it must be placed upon the proprietor's real property for a permanency, or be incorporated therewith: Art. 379, Civil Code; and see Banque d'Hochelaga v. Waterous Engine Works Co., 27 S. C. R. 406. This is precisely the law of England: Wake v. Hall, 8 App. Cas. 195. If, therefore, according to the Privy Council, rails of a street railway are not "anything which is real estate," then street cars are not immovable by destination in the province of Quebec. But this result opens up other questions. If the street cars are not realty when on the company's lines on the streets, what is their character when in the company's shops, which are real estate? It might be said that they are not placed there for a permanency; but the relation of their permanency to the proportion of time they are out of the streets is even greater, perhaps, than the relation of permanency of a railway company's freight cars on its own lines to the proportion of time such cars are on foreign lines. A street railway company's cars return daily to the headquarters from which they emanate, whereas a railway company's freight cars are to be found scattered all over the continent, often not to return for months. The fact is that a railway company's cars are not necessarily intended to be placed on their lines as a permanency. They are intended to convey freight or passengers from stations on their lines to stations on any other connecting company's lines without breaking bulk. The Supreme Court of the United States have declared that the practice of granting in railway charters, first, the power to locate, construct, and maintain the road, second, to equip it with proper rolling stock, and, third, to transport goods and passengers upon it, evidently springs from the conviction that a railway company is not necessarily a transportation company, and that, to make it such, express authority must be given for that purpose, in

compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication: Lake Superior and Miss. R.R. Co. v. United States, 93 U. S. 442, 451. And a standard French author on commercial law states that rolling stock of a railway is not used in the exploitation of the railway, but rather in the general transportation of merchandise; it is therefore not immovable by destination: Massé, Droit Commercial, 3rd ed., p. 538, No. 1376; and see peculiar agreement between the Calgary and Edmonton R. W. Co. and the Canadian Pacific: 5 Terr. L. R. 420.

If these cars are not placed on the line as a permanency, neither are they incorporated therewith, for the Privy Council say they do not form part of the railway.

In Quebec, Art. 384 of the Civil Code describes as movable by nature "all bodies which can be moved from one place to another . . . by extrinsic force, as inanimate things." This necessarily applies to the rolling stock of a railway company, and it ought to require something very definite to except rolling stock from that Article and bring it within the purview of Art. 379.

Now, Art. 379 describes as immovable by destination, movable things which a proprietor has placed on his real property for a permanency, or which he has incorporated therewith . . . so long as they remain there. The Article then proceeds to enumerate examples of what constitutes immovables by destination — with the above restrictions, viz:—

1. Presses, boilers, stills, vats and tuns.

2. All utensils necessary for working forges, paper mills, and other manufactories.

Manure, and other substances intended for manure, are likewise immovable by destination.

It has invariably been held in this province that railway rolling stock is immovable by destination, but in none of the cases, apparently, has the question been seriously

discussed so far as the reports of the cases indicate: Ontario Car Foundry v. Farwell, 18 S. C. R. 1; Morrison v. Grand Trunk R. W. Co., 5 L. C. J. at p. 319; Grand Trunk R. W. Co. v. Eastern Townships Bank (Q. B.), 10 L. C. J. 11; Barker v. Central Vermont R. W. Co., Q. R. 14 S. C. 467, 4 Rev. de Jur. 454.

There is certainly nothing in the examples enumerated in Art. 379 to indicate that rolling stock of a railway is immovable by destination. The chief difficulty seems to have arisen from reading into our Article some provisions from the corresponding Article of the Code Napoleon, i.e., "things which a proprietor has placed on his real property for the service and exploitation of that property." Now, these words do not occur in our Code, and Meredith, C. J., and Stuart, J., in Wyatt v. Levis R. W. Co., 6 Q. L. R. 213, said that the principle enunciated by these words was wholly unknown to our law; at p. 226, Casault, J., dissented from this view, and held that this doctrine formed part of our common law before the Code.

This case dealt with the question whether railway ties, cord-wood, and office furniture, and other things of the kind, were immovable by destination. Strangely enough, the railway company in whose hands these objects were seized, together with their rolling stock, admitted in their factum that rolling stock was immovable by destination, which shews how imbued the profession were at that time with this view of rolling stock.

It is to be noted that in Grand Trunk R. W. Co. v. Eastern Townships Bank, 10 L.C.J. 11, Duval, J., said—but his notes were not reported—see 6 Q. L. R. at p. 216 (translation): "The Court's ground for rendering judgment in this case is, that the locomotive is an immovable and forms as much a part of the railway as the wheel forms part of a carriage." This is not—as above shewn—in accordance with the Privy Council view.

Drummond, J., in the same case, said: "It (the locomotive) is to all intents and purposes part of the realty,

un immeuble par destination. and is no more liable to seizure, apart from the immovable property to which it belongs, than the detached burrstones in a mill, the vats in a brewery, or the boilers in a sugar factory."

This shews clearly that the Court considered locomotives as in some way attached to the railway, contrary to the view of the Privy Council.

But even in France, where, as already pointed out, the code is more favourable to the contention that rolling stock is immovable by destination than our own, there is very little to help forward that contention. There is only one case on the subject reported, railways there being under State control. In a case decided at Bourges, France, in 1867 (Dalloz, 1867-2-76), it was held that rolling stock used on a private railway operated for the purpose of a quarry, was immovable by destination, the railway itself being immovable by nature, although only part of the land over which it ran was owned by the railway's proprietor, the remainder being held by him under lease. Yet, as against this, we have the opinion of a standard author on commercial law —Massé, Droit Commercial, 3rd ed., p. 538, No. 1376—who says that rolling stock of a railway is not used in the exploitation of the railway, but rather in the general transportation of merchandise; it is therefore not immovable by destination.

But even the Bourges case is weakened by an examination of the annotator's notes thereto. There was an earlier decision in 1866 decided at Metz (Dalloz, 1866-2-171) holding that the horses and waggons used by a brewer for the conveyance of his products to his customers, were not immovable by destination. The annotator reconciled the two cases on the ground that the rolling stock of the quarry railway served to carry the products of the quarry to a fixed point, whence the products were transferred to their destination by breaking bulk, whereas the brewer's horses and waggons were used for purposes outside the brewery, although

emanating therefrom. This reasoning adapted to those of our roads which have through traffic connection with other lines would render their rolling stock movables according to the Metz case.

In Bank of Montreal v. Kirkpatrick (C. A.), 2 O. L. R. 121—overruled by the Privy Council so far as the Ontario Court's views regarding street railway rolling stock were concerned—it is interesting to note that such Court took a different view of the rolling stock of an ordinary steam railway. After pointing out that in England, in view of the legislation and by anterior decisions under the common law, rolling stock is personal property, went on to say, *inter alia*, at p. 122: "There are others (reasons) arising out of the peculiar character of a road of that description (an electric railway) which appear to me to justify us in regarding it as *sui generis*, and relieve us from any embarrassment which might otherwise be caused by the cases which I have referred to." And again: "While the rolling stock of the ordinary steam railway may be hauled by a locomotive resting by its own weight and generating its own power over the lines of many different companies, to none of which it belongs, and thousands of miles from its home, that of the street railway really constitutes part of one great machine." And see Hart v. Railway Co., 7 Ex. 245.

In the United States, while opinions on this subject are somewhat divided, yet the leading authors take the view that rolling stock is personal property: Baldwin's American Railroad Law (1904), p. 12; Jones Railroad Securities, § 154. There is an article in the Canada Law Journal, vol. 40, p. 763, criticizing the judgment of the Privy Council in the Toronto Street Railway case.

Finally, it is to be noted that in a Privy Council appeal from the province of Quebec, in the case of Redfield v. Corporation of Wickham, 13 App. Cas. 467, at p. 473, their Lordships remark — no doubt, obiter — that "the sheriff seized . . . all the rolling stock and other appurtenances of the railway, which are immeubles according to the statute law

of Quebec." Since the law of Quebec is substantially the same as the law of Ontario on this question (see Kirkpatrick's case, 2 O. L. R. at p. 122), their Lordships might have some difficulty in explaining it away on some future occasion should they be of opinion that under the Ontario law the rolling stock of an ordinary steam railway is personalty.

We say the above remarks were probably obiter because the rolling stock, whether movable or immovable by destination, was covered by a statutory mortgage in favour of the debenture-holders, and while the respondents were allowed execution against the railway, it was only subject to the bondholders' priority in the distribution of the proceeds of sale.

Summary.

1. Ontario Courts would feel themselves bound by English precedents which favour the view that rolling stock is personalty.

2. Quebec Courts have invariably held that rolling stock is immovable by destination, but, it is submitted, without valid reason.

3. In France the doctrine and jurisprudence would seem to shew that where rolling stock is not meant for the carriage of merchandise exclusively on the line of the company owning it, it is not immovable by destination.

4. In the United States the weight of authority favours the view that rolling stock is personal property.

5. In England and many of the States the subject is regulated by express legislation.

S. W. JACOBS.

Montreal, March 1st, 1907.

FAIR COMMENT IN AN ACTION FOR LIBEL.

A case recently decided in the Court of Appeal, Thomas v. Bradbury, Agnew & Co., Limited, [1906] 2 K. B. 627, regarded in the light of previous decisions, has called forth considerable adverse criticism. In this case the plaintiff, a journalist, who was the author of a book entitled "Fifty Years of Fleet Street," being the life and recollections of Sir John R. Robinson, brought an action of libel based on a critique of the book written by Henry W. Lucy, and published by the defendants, in "Punch," of which the defendants were the publishers and proprietors. The review was a severe one, and contained some sharp strictures on the book's alleged defects and lack of literary merit. The defendants pleaded that the words complained of were incapable of a defamatory meaning; that they were written for publication and were published as a criticism and fair comment upon a matter of public interest. The case was tried before Darling, J., with a jury. A verdict was found for the plaintiff with £300 damages. On the trial extrinsic evidence of malice was allowed by the Judge to go to the jury—such as evidence of the strained relations between the plaintiff and the author of the critique before action brought; also of certain expressions which fell from Lucy, coupled with his demeanour towards the plaintiff, all of which, it was contended, served to shew that the feelings of the contributor towards the plaintiff were such as evinced actual malice—the object being to establish such hostility towards the plaintiff, on the part of Lucy, as to influence the minds of the jurors in determining the question whether the criticism was within the limits of fair and bona fide comment. On appeal it was strongly urged by counsel for the defendants, that if the criticism itself does not on its face exceed the limits of fair comment, then proof of malice in the writer does not destroy his immunity; that, even if the review is a

severe criticism upon the style in which the book is written, yet if it is a bona fide criticism upon a matter of public interest, honest and relevant, it is fair comment; that if there were two criticisms of the same book by different writers, both couched in similar terms, and each being on its face fair comment, it could not be said that one exceeds the limits of fair comment because the writer of it is actuated by a malicious feeling towards the author of the book, whereas the other does not exceed the limits of fair comment because the writer of it is not actuated by malice; that the malice of the writer, unless it appears on the face of the criticism, is irrelevant to the question of fair comment; that fair comment is no libel; and that proof of actual malice is only necessary when the occasion is privileged. Collins, M.R., in delivering the judgment of the Court dismissing the appeal, said (p. 642): "It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it. I am of opinion, therefore, that evidence of malice actuating the defendants was admissible, and that the learned Judge was right in letting the evidence in this case go to the jury." And at p. 640: "Proof of malice may take a criticism prima facie outside the right of fair comment, just as it takes a communication prima facie privileged outside the privilege." And here the question for the present stands surrounded by the conflicting judgments, and the no less conflicting obiter dicta, of our ablest Judges.

It would seem a reasonable conclusion that fair comment on public acts, writings, and theatrical and other performances, is a matter not of privilege, but of common right. It would likewise seem a reasonable conclusion that the law does not stop to inquire with what motive a common right is exercised. An act done maliciously does not thereby become

wrongful, if it is not wrongful in itself. Such is the law in case of an action for malicious prosecution. If the informant has reasonable and probable cause to prefer a criminal charge, an action will not lie for setting the machinery of law in motion, although prompted by actual malice. The like principle was applied to the law of defamation by Lindley, L.J., in Hubbuck v. Wilkinson, [1899] 1 Q. B. 86.

Over this question of privilege two rival theories long struggled for mastery, each enlisting advocates among our ablest Judges. The one being, that bona fide comment, on matters of public interest, comes under the head of qualified privilege; and being conditionally privileged, the plaintiff must prove malice, however defamatory and false the words complained of may be. The other being that the occasion is not privileged and no action lies, if the words complained of were a fair and bona fide comment on a matter of public interest. The contest centred chiefly around three leading cases—Campbell v. Spottiswoode (1863), 3 B. & S. 769; Henwood v. Harrison (1872), L. R. 7 C. P. 606; and Merivale v. Carson (1887), 20 Q. B. D. 275. A review of these cases may prove profitable as well as interesting.

In Campbell v. Spottiswoode the plaintiff published in a paper, of which he was the proprietor, a series of letters, on the duty of evangelizing the Chinese. The defendant, in another newspaper, commenting on the plaintiff's scheme, imputed that its real object was to promote the sale of his paper, and suggested that the names of some of the subscribers, in the list of published contributors, were fictitious. The jury found for the plaintiff, coupled with the additional finding that the writer of the article believed the imputation to be well founded. The Court of Queen's Bench in banc refused a rule for a new trial or to enter a verdict for the defendant.

Crompton, J., is reported as follows (3 B. & S. 778): "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the

proceedings in Courts of justice or in Parliament, or the publication of a scheme or of a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a bona fide belief that he is publishing what is true, that is any answer to an action for libel. With respect to the publication of the plaintiff's scheme, the defendant might ridicule it and point out the improbability of its success; but that was all he had a right to do. The first question is, whether the article on which this action is brought is a libel or no libel,—not whether it is privileged or not. It is no libel, if it is within the range of fair comment, that is, if a person might fairly and bona fide write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged communications, in which the malice of the writer becomes a question for the jury; that is, where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right, as opposed to the rights possessed by the community at large, to assert what he believes. In these cases of privilege there is an exemption from legal liability in the absence of malice: and it is necessary to prove actual malice. But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true."

Blackburn, J., at p. 780, said: "If it could be shewn that the editor or publisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition; and I

take it to be certain that he has only the general right which belongs to the public to comment upon public matters, for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement: Paris v. Levy, 2 F. & F. 71. In such cases every one has a right to make fair and proper comment; and, so long as it is within that limit, it is no libel."

Mellor, J., said (p. 782): "But giving full latitude to fair comment, so soon as a writer imputed that the person proposing the scheme is doing it from a base and sordid motive, and is putting forth a list of fictitious subscribers, in order to delude others to subscribe, it cannot be said to be within the limits of fair criticism. If comment is beyond the limits of fair criticism it becomes a libel. And I agree that the question in this case is, libel or no libel. If the words were used upon a justifiable occasion, no action could be maintained; for the interests and exigencies of society require that there should be free communication between parties who have a duty, either moral or legal, to discharge towards each other, as in the common case of a master giving the character of a servant, in which defamatory words are privileged unless proved to be false and malicious."

Such then was the considered judgment of the Court of Queen's Bench, in 1863, as to the questions of "privilege" and "fair comment" in actions of libel. Apparently these questions would seem to have been settled upon an intelligent and satisfactory basis.

In 1872 the Court of Common Pleas, however, ignored the decision in Campbell v. Spottiswoode, and held, in Henwood v. Harrison, L. R. 7 C. P. 606, that the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice. The plaintiff was nonsuited, on the ground that

the publication was in the nature of a fair criticism of a proposal affecting a matter of great national importance, and therefore, being bona fide, and without malice, privileged. On appeal the Court, Grove, J., dissenting, held that the nonsuit was right.

Willes, J., in delivering the judgment of the majority of the Court (Willes, Byles, and Brett, JJ.), said (p. 626): "In the present case, there was no suggestion and no evidence of malice in any one. The honesty of the publication and the absence of malice were admitted; and there was nothing to be decided except the question of law, whether the occasion was privileged. The learned Judge ruled that it was."

In 1887 in Merivale v. Carson, 20 Q. B. D. 275, the Court of Appeal held that where an action of libel is brought in respect of a comment on a matter of public interest, the case is not one of privilege, and actual malice need not be proved, and that it is for the jury to determine whether the comment goes beyond the limits of fair criticism. Henwood v. Harrison was dissented from and Campbell v. Spottiswoode approved and followed. The action was brought to recover damages for an alleged libel contained in a critique published by defendant upon a play written by the plaintiff and his wife. The jury found a verdict for the plaintiff. On appeal the judgment was affirmed.

Lord Esher, M.R., in delivering the judgment of the Court, at p. 279 and following, said: "What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant, unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in Campbell v. Spottiswoode, which has never been overruled. All the Judges, both before and ever

since that case, have acted upon the view there expressed, that a criticism upon a written published work is not a privileged occasion. Blackburn, J., in his judgment, shews why it is not a privileged occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged. . . . What is the meaning of 'fair comment?' I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond the limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which, if taken alone, may seem to limit too much the question put to the jury. But, when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the Judge to the jury: "If it is not more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendants." He gives a very wide limit, and, I think, rightly. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed

limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticized? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all."

The question of "privilege" and "fair comment" underwent thorough discussion in a New Brunswick case, Brown v. Elder (1888), 27 N. B. Reports 465. The action was brought by the keeper of the lighthouse at Quaco against the proprietor of "The Telegraph," a St. John daily paper, for publishing a communication reflecting sharply upon the plaintiff's conduct on the occasion of a shipwreck, with loss of life, that occurred in the vicinity of the lighthouse. On the trial a verdict was found for the defendant. Chief Justice Allen, the trial Judge, substantially told the jury that the occasion was privileged, and if the author of the communication honestly believed what he had written, however defamatory, it would not amount to a libel. In justice to the Chief Justice it may be said that when he delivered this charge, Merivale v. Carson had not been reported. On appeal to the Supreme Court in banc a new trial was ordered.

King, J., in the course of his judgment, which was a most thorough and exhaustive review of all the leading authorities on the question, said (p. 488): "In one sense the question whether criticisms of books or of the conduct of public men are privileged or not in the sense in which confidential communications are privileged, is largely, as Bowen, L.J., says, an academical question. It is in some sense a question of words, because if there is in the former cases a right of making fair comment, it is not important in one sense whether you call it a privilege or a right. A right is of as high order as a privilege. Still the distinction is worth noting as marking the distinc-

tion between the limits and conditions of liability. Confidential communications are largely private, and their effect is limited if defamatory; and, if bona fide and honestly made without actual malice, there is no liability. While in the case of communications made publicly, the limits of exemption from liability are narrower, and perhaps for one reason, amongst others, that the possible injury from mistake is incalculably greater. However, whatever the reason, and whether it be called a privilege or not, there is no doubt that the right to comment upon books or conduct of public men, etc., is more restricted than the right or privilege to make confidential communications of a privileged character. The law, then, is well settled that in the case of comments on books or on public men, or other matters of public interest, there is an excuse or justification for publishing, otherwise defamatory matter, only if the publication is a fair comment or criticism. And from the authorities cited it appears that the comment must be fair as related to the actual, i.e., the proved facts; and that matters which are not true, and are at the same time defamatory, may not be stated as facts, and then commented upon as if they were facts. The honesty and bona fides of defendant are not a legal justification or excuse, provided the comments are not fair comments. As to what are fair comments, see Merivale v. Carson. At the time of the trial the case of Merivale v. Carson had not been reported, and I think one can see reflected in the charge of the learned Chief Justice the conflict between Campbell v. Spottiswoode and Henwood v. Harrison, which Merivale v. Carson has put an end to by sustaining the earlier case, but which the learned Chief Justice, as was reasonable in the then state of the authorities, did his best to reconcile. If Merivale v. Carson had been reported at the time of the trial, the learned Chief Justice would not have charged as follows: 'If the writer of the letter, believing the truth of it and having reasonable ground for believing it to be true, had so written it, then I would not say that it had gone beyond the limits of fair comment, i.e., provided he did it honestly and

with the intention of expressing what he believed to be inhuman conduct on the part of the plaintiff; but if he wrote it recklessly, without inquiry and without knowing whether it was true or not, and without reasonable ground for believing it to be true, then I would say that it would not be justifiable. . . You must consider whether the letter is a fair comment and was written honestly and not for the purpose of injuring plaintiff, but for the purpose of giving effect to what the writer of the letter believed to be a serious charge against a man for acting inhumanly and not doing what he could to save the lives of people. . . If you think there was no justification of the letter, and that the writer of the letter had no honest intention and no justification for writing such letter, and did not believe it to be true, then the plaintiff would be entitled to such damage as you think he ought to have.' I think it is impossible in the present state of the law to uphold these passages in their substantial import, and therefore, I am of opinion that there should be a new trial."

It is to be hoped the case of Thomas v. Bradbury, Agnew & Co., Limited, will be carried on appeal to the House of Lords and a finality reached in this long vexed question of "fair comment." Not that it will necessarily be right and satisfactory, for, according to Baron Huddlestone, "There is no such thing as being right in law. The House of Lords are only right because there is no Court above them to overrule them."

St. John, N.B. SILAS ALWARD.

RECENT CASES FROM THE TIMES LAW REPORTS.*

Bailment.]—An engraving company, after printing certain book illustrations from engraved plates, retained the plates as gratuitous bailees. The plates were taken from their custody and were lost. On suit being brought against the company by the owner, the defendants shewed that the plates had been kept in a proper place and in care of proper persons, and there was no evidence of negligence or of how the loss of the plates occurred. The action was dismissed at the trial, and the Court of Appeal dismissed an appeal, the defendants, as gratuitous bailees, having used as much care as a reasonable man would use on keeping his own property: Bullen v. Swan Electric Engraving Co., 23 T. L. R. 258.

Contract.]—National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., 23 T. L. R. 189, raises again the question of liability in tort for interference with contractual relations. One Ell purchased the plaintiffs' goods from a wholesale dealer, and signed a document stating that in consideration of the sale by the dealer to him of the plaintiffs' goods at certain prices, he agreed with the plaintiffs to be bound by their price lists and conditions of sale, one of which was that retail dealers were not to sell the plaintiffs' goods to dealers who were on the suspended list. The defendants were on the suspended list, and Ell sold the goods to an agent of the defendants. It was not shewn that the defendants or their agent procured Ell to violate his contract (if any) with the plaintiffs. The defendants' conduct was not malicious, nor was their purpose to injure the plaintiffs. The action was brought for an injunction restraining the defendants from inciting persons who had entered into the retail dealers' agreements with the plaintiffs,

* Volume 23, Nos. 8, 9, 10, 11, to week ending the 29th January, 1907.

to sell the plaintiffs' goods in breach of those agreements. Mr. Justice Joyce doubted whether any contract between the plaintiffs and Ell in fact existed, but held that, assuming the defendants' agent knew that the transaction involved a breach of such a contract, the action would not lie.

Damages.]—The plaintiff applied to M. A. P., a newspaper, for advice as to the investment of his money, and for the name of a good stockbroker. The editor handed the letter to a broker authorizing him to introduce himself to the plaintiff in response to the latter's inquiry. The plaintiff intrusted the broker with the investment of the money, and the broker, who turned out to be an undischarged bankrupt, and not a member of the stock exchange, misappropriated it. As the newspaper had assumed to give financial advice, both in a column headed "Spare Cash and Advice" and otherwise in response to inquiries, its proprietors were held liable to make good the loss. The editor had been negligent in not ascertaining the broker's real standing, and this had been the primary and substantial cause of the damage sustained. The damages were not too remote, and the fact that the broker had been guilty of a criminal offence did not relieve the defendants of liability: De la Bere v. Pearson, 23 T. L. R. 264.

Debtor and Creditor.]—Where a creditor, about to go abroad, gave signed directions that moneys to become payable during her absence should be paid to her account at a bank within the jurisdiction, it was held that the debtor must pay as directed. The debtor in this case sent to the creditor's solicitors a cheque to the creditor's order. The solicitor returned it, and began an action for the amount of the debt. The debtor contended that he had a right to insist on having the creditor's indorsement as proof, inter alia, that the creditor was still living and the agency of the bank to receive payment unrevoked. Judgment was given for the amount due with full costs of action: Shrewsbury v. Shrewsbury, 23 T. L. R. 277.

Fire Insurance.]—Equitable Fire and Accident Office (Limited) v. Ching Wo Hong, 23 T. L. R. 200, raised an interesting question upon the construction of conditions in an insurance policy. A policy of fire insurance issued by the appellants contained a provision that no additional insurance was allowed except with the appellants' consent, and that a breach of the condition would render the policy null and void. There was also a condition that the respondents must give notice of any other insurance on the goods, and that the giving of the notice should be a condition precedent to recovery on the policy. Subsequently a policy of insurance against fire was issued by another company covering the same goods, and handed to the respondents. It contained a statement that the respondents "having paid" the premium the company insured the goods against damage by fire; and by a condition indorsed on the policy it was provided that the insurance would not be in force nor would the company be liable in respect of any loss or damage, before the premium was paid. No premium was in fact paid, and no notice was given by the respondents to the appellants of the policy. A few months after the execution of the latter policy, the goods were damaged by fire. It was held by the Judicial Committee of the Privy Council that, as the premium had not been paid upon the second policy, that policy never became effective, and the respondents were therefore entitled to recover upon the first policy. Their Lordships were of opinion that the words "having paid" in the body of the second policy created no estoppel, and that the question whether or not the second policy had become effective must be decided in the same way as if an action had been brought upon it by the respondents.

Lands Injuriously Affected.]—A case of some interest as to the right to compensation for lands injuriously affected by the exercise of statutory powers is London and North Western R. W. Co. v. Reddaway, 23 T. L. R. 279, in which the claimant was allowed to recover for depreciation of his property by reason of the erection and user of a station in

the neighbourhood of, but not upon, land taken from him. By the terms of a special Act, he had the right to claim compensation in the same manner as if part of his land had been taken for the purposes of the railway. The effect of the decision, therefore, is that where part of a claimant's land is taken for purposes of a railway, he is not limited to compensation for damages caused by the exercise of the railway company's powers on the lands so taken, but may claim also for damages caused to his remaining property by the exercise of such powers upon neighbouring lands.

Libel.]—The decision in Pullman v. Hill and Co., [1891] 1 Q. B. 524, which was discussed and followed in Puterbaugh v. Gold Medal Furniture Manufacturing Co., 7 O. L. R. 582, has been again explained in Edmondson v. John Birch and Co. (Limited) and Horner, 23 T. L. R. 234. There the plaintiff was engaged temporarily as manager by a company in Japan, and it was arranged that the company should communicate with the defendants in England and, if they approved the engagement agreement, the plaintiff should be continued in the permanent employment of the Japan company. The defendants and the Japan company carried on business in connection with each other, and each company acted as the agent of the other. In answer to an inquiry by the Japan company, the defendants sent a letter and a cable to the Japan company, which were complained of as libellous. These were dictated by Horner, the defendants' managing director, to a clerk, and were copied in the defendants' letter-book. The Court of Appeal (Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.), thought the decision in Pullman v. Hill and Co. did not govern this case, and that the defendants were not liable, because the evidence shewed that what was done by the defendants was done in the reasonable and ordinary way. Lord Justice Fletcher Moulton thought the rule might be stated thus:—If a business communication was privileged, such privilege covered all the incidents of the transmission

and treatment of that communication in the ordinary and usual way.

Master and Servant.]—In Dewar v. Tasker, 23 T. L. R. 259, the Court of Appeal, reversing the judgment of a Divisional Court (22 T. L. R. 303), held that where an engine was supplied by the defendants to another person, the defendants supplying also a driver for the engine, and keeping it in repair, the defendants were liable to the plaintiff for injuries caused by the driver's negligence. It was shewn that the driver was under the direction of the person to whom the engine had been hired, as to the trips to be made and the loads to be carried. The defendants, in fact, knew little or nothing of the operations which were being carried on. But the Court of Appeal held, nevertheless, that the driver was in the employment of the defendants, and under their control, since they appointed him, paid him, and had the power of dismissing him. They were therefore liable for his negligence.

Money Paid into Court.]—In Maxwell v. Viscount Wolseley, 23 T. L. R. 157. the Court of Appeal (Collins, M.R., and Farwell, L.J.), held that the Court had jurisdiction to order that money paid into Court without a denial of liability by a defendant in an action of libel, and not taken out by the plaintiff, should be paid to the plaintiff's executor when the action abated by reason of the plaintiff's death. The Court referred to authority shewing that apart from the Rules there was an inherent jurisdiction in the Court to deal with the matter.

Professional Misconduct.]—In Clifford v. Timms, 23 T. L. R. 274, the parties had been in partnership as dentists. The plaintiff's name was struck off the dentists' register by the General Medical Council, on the ground that he was a shareholder and director of a company carrying on a dental business, which employed unregistered persons to attend patients, and advertised by means of pamphlets. This

was held by the Council to be "infamous or disgraceful conduct in a professional sense." Held, however, that whether the plaintiff's name had been rightfully struck off the register or not, his conduct was not "professional misconduct" within the meaning of the partnership agreement, which gave either party the right to terminate the partnership for that cause.

Restraint of Trade.]—The decision of Neville, J., in Leetham v. White, 23 T. L. R. 144, has been reversed by the Court of Appeal, 23 T.L.R. 254. The action was brought to restrain the defendant, a former employee of the plaintiffs, from continuing in the service of rival dealers in the same commodities, contrary to a covenant not to enter such service within Great Britain and Ireland for five years from the termination of his engagement with the plaintiffs. The plaintiffs were a principal company and five subsidiary companies, who together carried on business all over the United Kingdom, and Neville, J., held that for that reason the area of restriction was not too wide for their protection, and granted the injunction asked for. The Court of Appeal holds that though employed by the chairman of the principal company the defendant was in the service of one of the subsidiary companies only, the business of which was confined to three northern counties. This subsidiary company had a right to protect itself by such an agreement as that proved, but it could not make such an agreement for the protection of allied concerns. Contracts in restraint of trade such as this, could only be allowed for the protection of the particular business in which the servant was employed.

Trade Name.]—The phrase "incorporated accountant," used by agreement to designate a member of an incorporated body of accountants, was held in Society of Accountants v. Goodway, 23 T. L. R. 286, to be a fancy term and not merely a descriptive term, and an injunction was granted

to restrain its use by an accountant who was not a member of the society.

Will.]—In Simpson and Biggs v. Foxon and Foxon, 23 T. L. R. 150, a testator, after making a will disposing of his property, executed another document described as his "last and only will," by which he dealt only with a sum secured by a policy of insurance on his life. He afterwards executed a codicil to his last will. It was argued that the effect of the words "and only" in the second testamentary paper was to revoke the first, but, as that would have created an intestacy as to most of his estate, which could not have been intended, it was held that all three documents should be admitted to probate.

Workmen's Compensation Act.]—In Darlington v. Roscoe and Sons, 23 T. L. R. 167, the widow of a workman who was killed by accident, made a claim for compensation under the Workmen's Compensation Act, 1897, but died before a request for arbitration was filed. Her administratrix commenced arbitration proceedings, and an award was made in her favour, which was upheld by the Court of Appeal. The decision turned upon the construction of the statute, the Court holding that at the time of her death the widow was in possession of a statutory right to an ascertained sum, and that the maxim actio personalis moritur cum persona had no application. The case may be usefully noted in connection with McHugh v. Grand Trunk R. W. Co., 2 O. L. R. 600.

THE LATEST ONTARIO DECISIONS.*

Appeal to Supreme Court of Canada.]—It was urged in support of an application for leave to appeal to the Supreme Court of Canada, in Lovell v. Lovell, 9 O. W. R. 227, under 60 & 61 V. c. 34, s. 1 (e), that the case was an important one to the parties and to the public, involving a definition of legal cruelty in a matrimonial cause, but the Court of Appeal (Meredith, J.A., dissenting) refused the application, on the ground that only a question of fact was involved. The proposed appeal was from the judgment of the Court of Appeal, 8 O. W. R. 517. The time for appealing was, however, extended (9 O. W. R. 261) in such terms as to enable the defendant to apply to the Supreme Court for leave to appeal, in the same manner and to the same extent as he might have done had the application for leave to the Court of Appeal been disposed of before the expiration of the time limited for appealing. Perhaps the chief interest of this decision lies in the remark of Moss, C.J.O. (with which Meredith, J.A., did not agree), that the circumstance that two Judges dissented from the opinion of the majority was not a special ground for granting leave.

Arbitration and Award.]—Upon an application under s. 13 of the Arbitration Act for leave to enforce an award, the Court may, in the exercise of its discretion, withhold leave, pending a motion to set aside the award: Re Baker and Kelly, 9 O. W. R. 136, per Mabee, J.

Assessment and Taxes.]—An appeal by the plaintiffs in Canadian Oil Fields Co. v. Town of Oil Springs, from the judgment of Boyd, C., 8 O. W. R. 480, noted 26 C. L. T. 800, was allowed by a Divisional Court (9 O. W. R. 118), on the

*Short notes of the most important cases in volume IX. of the Ontario Weekly Reporter, Nos. 2, 3, 4, 5, pp. 65 to 272, inclusive.

ground that the effect of s.-s. 3 of s. 36 of the Assessment Act (4 Edw. VII. c. 23) is to exempt mining plant from assessment because it could not add to the value of the land for agricultural purposes. The addition of the value of such mining plant to the value of the buildings upon the land was held not to be an assessment excessive in amount, but wholly illegal, and an act against which the Court has power to relieve.

Attorney-General.]—It was held by the Court of Appeal in Macoomb v. Town of Welland, 9 O. W. R. 143, that, whatever view may ultimately be taken of the effect of dedication of a highway by an individual, having regard to ss. 599 and 601 of the Municipal Act, in the case in question dedication would vest in the defendants a right of property in the highway sufficient to enable an action to restrain them from entering upon the lands constituting such alleged highway, to proceed without the presence of the Attorney-General.

Carriers.]—It was accounted by a Divisional Court, in James v. Dominion Express Co., 9 O. W. R. 93, negligence on the part of the express company such as to make them liable in damages, that the plaintiffs' two carloads of fish were transferred to a freight train at Winnipeg to be carried to Toronto, instead of being forwarded by a fast passenger train, as was usual and proper. From this liability they were held not relieved by a condition of the contract that they should not be liable for loss or damage for any cause whatever, unless it be proved to have occurred from the gross negligence of the company or their servants, for upon the authorities the conduct set forth constituted gross negligence, and, by the rule as to carriers, all agencies employed by them in the transaction of their business (whether independent lines of railway or not) are their agents, employees, or servants.

Chose in Action.]—An appeal by the plaintiffs in McMurchie v. Thompson from the judgment of Anglin, J., 8

O. W. R. 637, noted ante 39, was dismissed by a Divisional Court: 9 O. W. R. 247.

Company.]—The Court of Appeal in Monarch Life Assurance Co. v. Brophy, 9 O. W. R. 151, held that an application for shares in the plaintiff company signed by the defendant, was not binding upon him, because its signing and delivery were conditioned upon the plaintiffs agreeing to purchase from him a certain mortgage to enable him to make payments on these shares, and, at the time, the affairs of the company were being conducted by a board of provisional directors, whose powers under the company's Act of incorporation were not so extensive as to enable them to bind the company by an agreement to make advances to persons to enable them to make payments upon shares.——The plaintiff's appeal in Fischer v. Borland Carriage Co. from the judgment of Anglin, J., 8 O. W. R. 579, noted ante 39, was dismissed by a Divisional Court: 9 O. W. R. 193.

Contract.]—An appeal in Northern Elevator Co. v. Lake Huron and Manitoba Milling Co. from the judgment of Falconbridge, C.J., 7 O. W. R. 484, noted 26 C. L. T. 341, was dismissed by the Court of Appeal: 9 O. W. R. 139.—— In an agreement for the sale of an hotel, it was provided that, in case, for any reason, the purchaser did not carry out his agreement, he should pay the vendor $300. A Divisional Court decided that, though the contract for the sale of the hotel was unenforceable by reason of the provisions of the Statute of Frauds, the vendor was, on the purchaser's default, entitled to recover on the alternative agreement. A distinction was made between cases where the original agreement was illegal and void because wrong per se in the eye of the law, and where it was simply unenforceable: Mercier v. Campbell, 9 O. W. R. 101, adopting, as the result of an independent consideration, the rule in Knapp v. Carley, 3 O. W. R. 340.

Costs.]—The Court of Appeal, in Stephens v. Toronto R. W. Co., 9 O. W. R. 259, decided that where a sum of

money is paid into Court in satisfaction of all causes of action, and the plaintiff takes out the money in satisfaction of all causes of action, he is entitled, by virtue of Rule 425, to tax his costs on the High Court scale whatever be the amount of the sum paid in. It is held that Rules 1132 and 1133 have no application to such a case, and Babcock v. Standish, 19 P. R. 195, is expressly approved.

County Court Appeal.]—Being the court of last resort, a Divisional Court, in Mercier v. Campbell, 9 O. W. R. 101, upon an appeal from a County Court judgment, decided that a decision of another Divisional Court upon the question arising on the appeal, did not preclude an independent judgment; s. 81 (2) of the Ontario Judicature Act, which requires a court to follow the decision of a court of co-ordinate jurisdiction, not applying to a court of final appeal. See Canadian Bank of Commerce v. Perram, 31 O. R. 116.

Discovery.]—The Master in Chambers in Stone v. Davies, 9 O. W. R. 187, inclined strongly to the view that, upon the proper construction of Rules 267, 442, and 443, an appointment for the examination of a party for discovery issued before the delivery of the statement of defence and within the time allowed therefor, is regular so long as the time fixed for the examination is after the statement of defence has been delivered by filing and service thereof. In this case the appointment had been issued and the defence delivered upon the same day, and the appointment, under the ruling in Broderick v. Broatch, 12 P. R. 561, was held by the Master to be regular, since the Court will not regard the fraction of a day in such cases; but the order of the Master was reversed by Teetzel, J., who set aside the appointment as irregular: 9 O. W. R. 258.

Evidence.]—It is decided by Riddell, J., in McKinnon v. Gillard, 9 O. W. R. 77, that Con. Rule 461 does not permit the reading in one action of the examination for dis-

covery taken in another between the same parties, but the same may, and indeed must, be proved as admissions are ordinarily proved if they are to be so used. Where part of an examination is proved in this way, the other side, it is decided, should not be allowed to put in more of the examination than is necessary to explain what is already before the Court.

Execution.]—A gift of certain chattels was made by A. M. to his daughter-in-law. These chattels were afterwards seized by the sheriff as being the goods of the donee's husband. The question upon an interpleader issue was whether the goods were the goods of the donee as against the execution creditor. In view of the fact that the execution was also against A. M., and the rule that where goods are already in custodia legis a writ of fi. fa. attaches upon them without actual seizure, Riddell, J., held that the execution creditor must succeed, upon its being found that the goods belonged to A. M.: McKinnon v. Gillard, 9 O. W. R. 77.

Fraudulent Conveyance.]—A marriage settlement was held by Riddell, J., invalid as against creditors of the settlor, in Gillard v. Cuthbert, 9 O. W. R. 77, where it appeared that there was no real bargain between the husband and wife, but that she, knowing about 4 weeks before the day fixed for the wedding, that her betrothed husband had incurred a liability of $11,000, arranged with him that she should pretend to be unwilling to marry him without a marriage settlement; that she did a few days before the day fixed for the wedding make such a pretence, whereas she would have married him gladly without any marriage settlement.——Likewise in Gillard v. McKinnon, 9 O. W. R. 77, tried at the same time, a conveyance by a husband to his wife of a piece of land for the alleged consideration of the barring of her dower in two other pieces of land, where it appeared that the transaction was not a contract for valuable consideration, inasmuch as the wife would have barred

her dower as soon as the husband really wanted her, could not stand as against the creditors of her husband. Besides, the value of the wife's inchoate right of dower was an inadequate amount to be paid for the lands conveyed to her.

Highway.]—On the whole evidence in Macoomb v. Town of Welland, and having regard to the manner in which the alleged user first began, the qualified nature of the user in the later years, the acts of interruption, and the other circumstances, the Court of Appeal considered that it did not appear that the defendants had clearly and satisfactorily established the existence of the public right they had asserted, and that sufficient had been shewn to rebut any presumption of intention to dedicate or rededicate this old highway to the use of the public, and an appeal by the plaintiffs from the judgment of Anglin, J., 12 O. L. R. 362, 7 O. W. R. 876, noted 26 C. L. T. 502, was allowed: 9 O. W. R. 143.

Interest.]—The debt due in respect of a mortgage at the time of the passing of 63 & 64 V. c. 129, s. 2, is a liability existing at the time of the passing of that Act upon which interest must be computed, in the absence of express stipulation, as well for the period after that Act came into force as before, at the rate of 6 per cent. per annum: Plenderleith v. Parsons, 9 O. W. R. 265.

Local Option By-law.]—It was decided by Morgan, Jun. J. Co. C. York, in Re Weston Local Option By-law, 9 O.W.R. 250, that, upon a "scrutiny" under s. 369 of the Municipal Act, 1903, the powers of the Judge are limited to a scrutiny and counting of the ballots, and there is no jurisdiction to go behind the ballots or to inquire whether the persons casting the ballots were possessed of the legal qualifications to entitle them to vote; and also that, in arriving at the total number of electors voting upon a local option by-law, in order to ascertain whether it has been carried by the vote of three-fifths of such number, ballots cast for or against

the by-law, but which, under the provisions of the statute, have, in counting, been rejected for some defect in the ballot paper, are not to be included. See, in the same sense, Re Swan River Local Option By-law, 3 W. L. R. 546.

Malicious Prosecution.]—The plaintiff in Still v. Hastings, 9 O. W. R. 121, was a saw-miller and the defendant a lumber-dealer. According to the plaintiff's evidence, there was a negotiation between them for an exchange of lumber; certain lumber was said to have been taken by the plaintiff from the defendant's yard, whereupon the defendant prosecuted the plaintiff for theft. The plaintiff was acquitted and brought the action for malicious prosecution. At the trial, Mabee, J., held, upon hearing the plaintiff's evidence, that there were no facts in dispute requiring determination by a jury, and that upon the undisputed facts the plaintiff had failed to establish want of reasonable and probable cause. A Divisional Court, however, allowed an appeal by the plaintiff, holding that the facts did not warrant an assumption by the trial Judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange had in fact taken place, it had entirely passed from the defendants' mind, and these were questions upon which it was competent only for the jury to pass. Some remarks are made by Anglin, J., as to the advisability of eliminating actions of malicious prosecution from the exceptions in s. 112 of the Judicature Act, the effect of which he considers is to make it illegal to put questions to the jury in the excepted cases.——Having regard to Lord Tenterden's view (Wilkinson v. Howell, Moo. & M. 495) that a plaintiff suing for malicious prosecution must shew such a termination of the proceedings taken against him as furnishes "prima facie evidence that the action was without foundation," and on grounds of public policy, a Divisional Court, in Baxter v. Gordon Ironsides and Fares Co., 9 O. W. R. 194, held that the entry of a nolle prosequi or an abandonment of a prosecution for a criminal offence brought

about by a compromise or settlement with the accused or by his procurement, is not such a termination of the proceedings as will support an action.

Mortgage.]—The main subject of inquiry by the Master in Ordinary in Plenderleith v. Parsons, 9 O. W. R. 265, was whether one Howard was the agent of the mortgagee or of the Plenderleith estate in managing the mortgaged property and collecting the rents thereof, and whether, apart from this, the mortgagees had, by the receipt of rent or otherwise, so acted as to become mortgagees in possession. On the evidence, the Master, after an interesting and exhaustive review of the circumstances and authorities, reached the conclusion that Howard was not the agent of the mortgagee, and that the latter had not so acted as to displace the mortgagor from the control, dominion, and management of the mortgaged property, or taken rents in such a way as to take out of the hands of the mortgagor the business and duty of collecting the rents, if the tenants could pay them, as a diligent owner of the property would.

Negligence.]—The doctrine of "ultimate negligence," explaining Radley v. London and North Western R. W. Co., 1 App. Cas. 754, and adopting the view of the Irish Court of Exchequer in Scott v. Dublin and Wicklow R. W. Co., 11 Ir. C. L. R. 377, is expounded by Anglin, J., in a remarkable opinion delivered as the principal judgment of a Divisional Court in Brenner v. Toronto R. W. Co., 9 O. W. R. 198. The plaintiff, in crossing a street at a regular street crossing, was struck by a motor-car of the defendants. Negligence was alleged, but not found by the jury, while it was found that the plaintiff by the exercise of reasonable care could have avoided the injury. A new trial was ordered on the ground of misdirection, the trial Judge having withdrawn from the consideration of the jury a rule of the defendants requiring motormen to shut off power upon approaching a crossing. Had this been considered by the jury, they might well have found that, notwithstanding the

plaintiff's admitted negligence, the motorman might have prevented the injury, after he perceived the danger the plaintiff was in, had he not, by neglecting to shut off the power at the proper distance from the crossing, made it impossible to stop the car in time. The pith of the opinion of Anglin, J., is in these words: "Not without hesitation, because of the volume of American authority opposed to this view, and of the manifest difficulty which it may occasion in some cases in drawing a clear distinction between primary and ultimate negligence, I have reached the conclusion that negligence of a defendant incapacitating him from taking due care to avoid the consequence of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute ultimate negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is 'ultimate' negligence when it renders insufficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence."

Parent and Child.]—It was decided by a Divisional Court in Empey v. Fick, 9 O. W. R. 73, that a conveyance by a father to two of his daughters (to the exclusion of other children) of his farm, worth $5,000, subject to a mortgage for half that amount, in consideration of past services rendered without compensation for many years to the grantor, who was shewn to be mentally competent, and to have understood the transaction, and of his wife (mother of the grantees), for their lives, was not impeachable, as having been made without independent advice and improvidently, for, though the case was near the line, the facts that the papers were prepared by one who had been the solicitor

for the grantor, that the latter had had access to them for a considerable time before their execution, and that he had talked over their contents with his wife and the grantees, shewed that the transaction was entered into without haste, secrecy, or importunity. Then the maintenance of the parents was made an express charge upon the property, and the disposition of the latter was in accord with the clear and frequently expressed wishes of the grantor, and was, in the circumstances, a reasonable one, the fruits of which were enjoyed by the grantor for four years and until his death, and were still being enjoyed by his widow, without discontent or dissatisfaction.

Precatory Trust.]—A provision in a will that "in the event of any of my sons at any time becoming disabled through sickness or other causes, I desire that they shall have a home with my said son Alexander until they are sufficiently recovered and able to provide for themselves," coupled with a devise of lands to Alexander, was held by Riddell, J., in Gillard v. McKinnon, 9 O. W. R. 77, to be a mere expression of desire, "a pious wish," and not to create a precatory trust.

Public Schools.] — An appeal in McFarlan v. Greenock School Trustees from the judgment of Magee, J., 8 O. W. R. 672, noted ante 52, was dismissed by a Divisional Court: 9 O. W. R. 183.

Railway.]—The fact that a railway train was behind time was held by the Court of Appeal in Hanly v. Michigan Central R. R. Co., 9 O. W. R. 229, not to constitute such negligence as to warrant a recovery for injuries sustained by a person struck by the train at a level crossing. Section 215 of the Railway Act was held to have no application, having been enacted most probably in the interests of passengers or persons using the railway. In any event, it would be necessary to shew that the delay was due to negligence, and to negative negligence on the part of the plaintiff.

Sheriff's Sale under Execution.]—Though the purchaser of lands at a sale by the sheriff under an execution was, as the assignee of the judgment creditors, the party at whose instance the sale was made and entitled to the proceeds thereof, Riddell, J., in Stern v. Stern, 9 O. W. R. 65, decided that the sale in question was a valid one, because he considered that it was made to appear that there was no interference with the sheriff by the purchaser, that the sale did not take place under any circumstances of disadvantage to the debtor, and that the advertisement was sufficient, and the conduct of the sale unexceptionable. Another thing fatal to the success of the attack upon the validity of the sale, was the fact that it had been ratified by the debtor, who with full knowledge of the facts had arranged with her solicitors that they should bring an action against her in order that they might share in the proceeds, which they eventually did. It was pointed out, however, that, even if the sale were set aside, the land must be held by the defendant as a security for the amount of the execution with costs and expenses, an amount considerably in excess of the value of the land.

Specific Performance.]—An appeal in Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co. from the judgment of Teetzel, J., 8 O. W. R. 254, noted 26 C. L. T. 589, was allowed by the Court of Appeal, because there appeared to have been an agreement between the parties manifestly for the acquisition and partition of the lands purchased by the defendants, or whatever portion of them could be acquired by the defendants in the absence of opposition from the plaintiffs, and such an agreement ought to be enforced, and any amendments made necessary to its enforcement in the present action: 9 O. W. R. 158.

Statutes.]—An appeal by the plaintiffs in Re Sylvester Manufacturing Co. v. Brown from the order of Falconbridge, C.J., 8 O. W. R. 984, noted ante 114, was dismissed by a Divisional Court: 9 O. W. R. 89.

Trading Company.]—On an appeal in National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., the judgment of Falconbridge, C.J., 7 O. W. R. 436, noted 26 C. L. T. 354, was varied so as to limit the damages recoverable to the loss sustained by the non-delivery of goods for which orders were actually given by the plaintiffs prior to the defendants' repudiation of their offer on the 10th April, 1905: 9 O. W. R. 165.

Vendor and Purchaser.]—An appeal by the defendant in Bohan v. Galbraith from the judgment of Teetzel, J., 8 O. W. R. 559, noted 26 C. L. T. 808, was allowed by a Divisional Court. It was decided that the letter of the defendant setting out the terms on which he would sell was not, considering the course of dealing between the parties, an offer, the defendant having always intended that the business should be done by way of a formal offer in writing embodying all the terms, and an acceptance: 9 O. W. R. 95.

Water and Watercourses.]—An appeal in Stover v. Lavoia from the judgment of Boyd, C., 8 O. W. R. 398, noted 26 C. L. T. 742, was dismissed by a Divisional Court: 9 O. W. R. 117.

Will.]—An appeal in Re Keleher from the order of Meredith, C.J., 8 O. W. R. 225, noted 26 C. L. T. 592, was dismissed by a Divisional Court, a new contention of the appellant that the provision that "if Denis Keleher should die without issue certain lands should be equally divided between Patrick and Timothy Keleher," on the terms charges, payments, and conditions imposed upon Denis, entitled them to take only subject to reimbursing the estate of Denis the sums paid by him under such provision, being overruled: 9 O. W. R. 90.——The question of the validity of a restraint upon the alienation of lands devised was considered by a Divisional Court in Re Porter, 9 O. W. R. 197, and it was held, affirming the decision reported 8 O. W. R. 588, and approving Re Martin and Dagneau, 11 O. L. R.

349, 7 O. W. R. 191, that the restriction in question—that the devisee should not during his lifetime either mortgage or sell—was valid. "The distinction in many of the cases," says Teetzel, J., delivering the judgment of the Divisional Court, "is very finely drawn, and it is difficult, if not impossible, to reconcile them or to reduce them to any common principle. Suffice it to say that since the judgment of Sir George Jessel in In re Macleay, L. R. 20 Eq. 186, the Courts of this province, beginning with Earls v. MacAlpine, 6 A. R. 145, have consistently adopted the view that you may restrict alienation by prohibiting a particular class of alienation."

CASES FROM WESTERN CANADA.*

Constitutional Law.]—An order in council of the Dominion government creating and providing for the enforcement of miners' liens affecting Dominion lands, was held by Macaulay, J., in Re Steinberger (Y.T.), 5 W.L. R. 93, to be, in so far as such liens affected only machinery and chattels attached to such lands, intra vires, because the power to pass a lien law came within the exclusive jurisdiction of the Dominion, under s. 91 of the B. N. A. Act, and, according to the authorities, the right to define the procedure was incident to the right to pass the Act.

Discovery.]—The defendants' appeal in Fraser v. Canadian Pacific R. W. Co. (Man.), from the order of Mathers, J., 4 W. L. R. 525, noted ante 60, was allowed by the Court of Appeal, and the order of the Referee reinstated, on an undertaking by the defendants to produce for the inspection of the plaintiff's solicitor such of the papers on file as referred to the matters in question other than privileged ones on which the memorandum referred to in the judgment below, or some part of it, was founded: 5 W. L. R. 42.

Execution.]—The debtor in McCormack v. Anderson (N. W. P.), 5 W. L. R. 76, being unable to carry out a contract to purchase a farm, agreed to give to the vendors (the claimants), in satisfaction for his use and occupation, and the damages sustained by the claimants by his failure to carry out his agreement, all the grain upon the place. Wetmore, J., decided that the placing of this grain in the granary on the farm, and the boarding up of the windows thereof, and putting a padlock on the door by the claimants, was not such an actual and continued change of possession under

* Short notes of the most important cases in Volume V. of the Western Law Reporter, No. 2, pp. 41 to 136, inclusive.

Rule 356 of the Judicature Ordinance, as would entitle the claimants to such grain as against execution creditors whose executions were afterwards delivered to the sheriff.

Fraud and Misrepresentation.]—The evidence in Booth v. Beech (N. W. P.), 5 O. W. R. 71, disclosed that the plaintiff had never seen the land which he leased to the defendant, but made the representations in respect of which the defendant counterclaimed on the faith of what one from whom he had purchased had told him; that the defendant went on the land under the lease and remained in possession during the term, and that he had made no complaint to the plaintiff until after the completion of his term. In these circumstances, the counterclaim was dismissed by Newlands, J.

Guarantee.]—The effect of the decision of Mathers, J., in Fraser v. Douglas (Man.), 5 W. L. R. 52, is that where a person refuses to fill an order for goods unless payment of the price thereof is on certain terms guaranteed by his agent who took the order, and the latter replies by letter saying that he will guarantee the account, this amounts to a proposal to fill the order if the agent will guarantee payment, and no further notice to the latter is necessary to render him liable, and, upon payment, to entitle him to recover the amount from the vendee. The fact that the guarantee is limited to "this season only," whereas bills for the amount of the account are, pursuant to the terms of sale, drawn upon and accepted by the vendee at 4 months, will not relieve the purchaser from liability, since the agent, having taken the order in these terms, must have contemplated that payment might be deferred.

Highway.]—An appeal by the defendants in Iveson v. City of Winnipeg (Man.), from the judgment of Richards, J., 4 W. L. R. 53, noted 26 C. L. T. 646, was dismissed by the Court of Appeal: 5 W. L. R. 118.

Master and Servant.]—In Williams v. Hammond (Man.), 5 W. L. R. 41, the judgment of Perdue, J., 4 W. L. R. 208, noted 26 C. L. T. 648, was affirmed.

Negligence.]—The judgment of Dubuc, C.J., in Malcolm v. McNichol (Man.), 2 W. L. R. 515, noted 26 C. L. T. 154, was varied by the Court of Appeal (5 W. L. R. 45), and the action dismissed as against the defendants the Standard Plumbing Co., and it was held that while the caretaker of the building, in turning on the steam in the evening after the plaintiff had left, without first ascertaining whether the valve was closed, was guilty of negligence for which his employer was responsible, the act having been performed in discharge of the duties of his employment, yet Fiddler, the employee of the company, in assisting the caretaker, at his request, in turning on the steam, was acting outside the scope of his employment, and his employers were not liable.

Partnership.]—Phippen, J.A., in Slingsby Manufacturing Co. v. Geller (Man.), 5 W. L. R. 128, decided that the fact that the certificate of partnership required by the Partnership Act (R. S. M. 1902 c. 129) was not recorded at length in the book kept for the purpose in the office of the prothonotary of the Court of King's Bench, did not impose on a person named in such certificate as a special partner the liability of a general partner; also, that an error in the date of such certificate is not a false statement within the meaning of the Act; and that neither such error nor the omission from the firm name of the names of all the general partners, where the name of such person is not used therein, will not create such liability. The result of such non-compliance is held to be that the attempt to create a special partnership is abortive; and where the business is an established one, and no act has been done which is consistent only with a partnership, no partnership will be implied, and such person will not be liable as a general partner.

Payment out of Court.]—In McCann v. Dolan (Y.T.), 5 W. L. R. 107, Macaulay, J., exercised the discretion conferred on him by Rule 133, clause 3, of the Yukon Judicature Ordinance, to refuse to direct payment out of Court to the plaintiff of the sum of $170 paid in by the defendant to the credit of the action with an admission of his indebtedness to that amount, because it could work no great hardship on the plaintiff, and might work a hardship on defendant, if it were in the end held that he had paid in the full amount owing to the plaintiff. A different discretion is to be exercised in a territory such as the Yukon, where people are here to-day and gone to-morrow, from what should be exercised in an old and settled community.

Promissory Note.]—An important decision was that of Newlands, J., in Jones v. England (N. W. P.), 5 W. L. R. 83, that the holder of a promissory note payable at a particular place, cannot recover, unless such note has, before action brought, been there presented for payment. This turned upon the construction of s. 86 of the Bills of Exchange Act, 1890, and Warner v. Symon-Kaye Syndicate, 27 N. S. R. 340, was followed in preference to Merchants Bank of Canada v. Henderson, 28 O. R. 360. Upon the question of costs, which by the section are in the discretion of the Court, Newlands, J., ruled that, as there was no evidence that the defendant had had the money at the place of payment from the time the note was due until the commencement of the action, the judgment for the defendant should be without costs. It was also held that the fact that the note had been indorsed by the payee payable to his solicitor, to whom it had been handed for collection, did not preclude recovery by the payee, for the solicitor was not the holder.

Railway.]—It was decided by Macdonald, J., in Wicher v. Canadian Pacific R. W. Co. (Man.), 5 W. L. R. 44, that the defendants, though they had made and deposited, in compliance with the Railway Act, a plan, profile, and book of

reference, before entering upon the plaintiff's land, having failed to take the necessary proceedings to compensate the plaintiff, were trespassers, and that the plaintiff was entitled to bring an action for such trespass, and was not limited to the remedy provided by the Act.

Vendor and Purchaser.]—Because the letter relied on by the plaintiffs in Blackstock v. Williams (N. W. P.), 5 W. L. R. 85, as constituting a memorandum in writing of an alleged contract commenced, "The best I can consider," although it was stated therein that it was to be "good up the 19th instant at 6 o'clock p.m.," and that it was to be "under agreement at the following terms," Newlands, J., decided that the defendant had reserved to himself the right to reject the offer on the plaintiffs expressing their willingness to accept his terms, and that, therefore, there was no agreement between the parties that could be enforced.

Will.]—Campbell v. Campbell (N. W. P.), 5 W. L. R. 59, was an interesting case on the facts. The testator, a man of intemperate habits, was not sober when he executed the will which was attacked by the plaintiff, his widow, but he appeared to comprehend its contents and to understand the formalities required for its execution, and the importance of the witnesses being able to testify as to his mental soundness. The conclusion of Scott, J., was, notwithstanding these circumstances, that the testator was not of sound and disposing mind, and this was based chiefly on the inference from the facts in evidence that continued intoxication had induced a mental condition of unjust irritation towards his wife, whom by the will attacked he deprived of benefits given by a previous will.

Workmen's Compensation Act.]—In Re Varesick and British Columbia Copper Co. (B.C.), 5 W. L. R. 56, while Clement, Co.C.J., was unable to say affirmatively, on the evidence, that the applicants were at the time of the death of their son by the alleged negligence of the respondents,

in whose employ he was, dependent upon him for support, it is laid down that the benefit of the Workmen's Compensation Act, 1902, extends to persons within the prescribed relationship, whatever their race or residence, and this although an award in favour of such persons could not apparently be enforced in the manner provided in s. 8 of the Act. Cf. Gyorgy v. Dawson, 8 O. W. R. 784.

DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.*

Amendment of Conviction.]—In Rex v. McKenzie (N.S.), 2 E. L. R. 319, a summary conviction for a violation of the Customs Act was removed into the Supreme Court by certiorari, and a motion was made to quash it, on the ground that the term of imprisonment imposed in default of payment of the penalty was six months, whereas it could not, under the general provision in the Criminal Code, exceed three months, there being no term specified in the special section under which the conviction was made. The prosecutor contended that the conviction should be amended by reducing the term; but the defendant urged that the Court must, under the provisions of ss. 883 and 889 of the Code, before amending the conviction, not only be satisfied, upon a perusal of the depositions, that the offence charged was committed, but must also re-try the case by having the witnesses orally examined before it. The Supreme Court of Nova Scotia en banc held, however, that this was not necessary, and directed that the conviction should be amended by reducing the term of imprisonment to three months.

Bank.]—The discussion in Rex v. Lovitt (N.S.), 2 E. L. R. 384, while interesting, can hardly be regarded as profitable from a lawyer's standpoint, in view of the diversity of opinion. The defendant was the president of the Bank of Yarmouth, and was indicted and convicted for signing a false return to the government. The question reserved for the full Court was whether there was any or sufficient evidence to support the verdict of guilty. Weatherbe, C.J., and Meagher, J., were of opinion that there was no evidence whatever upon which a conviction could stand. Townshend, J., and Graham, E.J., were in favour of ordering a new

*Short notes of the most important cases in Volume II. of the Eastern Law Reporter, Nos. 7 and 8, pp. 305 to 416, inclusive.

trial, on the ground that the jury were not cautioned that they were not to be influenced by the other returns received in evidence in coming to a conclusion on the main issue respecting the offence charged. Russell, J., was of opinion that the case could not properly have been withdrawn from the jury.

Company.]—In American Hotel and Supply Co. v. Fairbanks (N.S.), 2 E. L. R. 345, Weatherbe, C.J., decided that the plaintiffs, being a foreign corporation doing business in Nova Scotia, and not having registered as required by R. S. N. S. c. 127, s. 18, as amended by c. 24 of the statutes of 1904, could not maintain an action for breach of a contract made in the course of business carried on in Nova Scotia. The statute does not, as is the case in some of the provinces, directly prohibit the bringing of an action nor the transaction of business by an unregistered foreign corporation, but it provides a penalty for default of compliance with its requirements; and held, that a statute imposing a penalty implies a prohibition, and an agreement involving the prohibited act is void for illegality.

Costs.]—An instance of a judgment depriving a successful plaintiff of costs, supported on appeal, is afforded by Fraser v. Walters (N.S.), 2 E. L. R. 374, where the plaintiff and S. swore that a stock of intoxicating liquors seized on the premises of S., by virtue of a warrant against S. under the Canada Temperance Act, had been sold to the plaintiff by S. The trial Judge found in favour of the plaintiff in an action for a return of the liquors, but deprived the plaintiff of costs because he inferred that the liquors were meant to be used and were more or less used in violation of the Act, and this was upheld as a proper exercise of discretion.——The still more unusual case of a successful defendant ordered to pay costs was presented in Sawler v. Municipality of Chester (N.S.), 2 E. L. R. 375, but the judgment therefor was reversed by the Court en banc, which held that the trial Judge could in his discretion,

while dismissing the action, deprive the defendants of costs by reason of their conduct, but he could not make them pay costs to the plaintiff.

Criminal Law.]—The questions reserved in Rex v. Clarke (N.B.), 2 E. L. R. 327, after conviction of the prisoner for attempting to commit rape, were chiefly as to the admissibility of evidence:—(1) The wife of the prisoner, being called on his behalf, denied that she had made a statement to a police officer inconsistent with a material part of her testimony, and it was held that the evidence of the police officer was admissible to rebut that denial. (2) It was proper to admit in evidence the statement of the victim of the assault and of her companion who was with her during the beginning of the assault, that they had described to the police officers the offender and the clothes he wore on the occasion, and to receive evidence from the officers that they had obtained from the girls such descriptions. (3) The father of the victim was properly allowed to state in evidence that his daughter gave in his presence a description of the offender, and to state what that description was. It was also held that it was not error for the trial Judge to omit to point out to the jury that the law permitted the finding of a lesser offence than that charged.——Upon an application for a writ of prohibition to a magistrate in Rex v. McGillivray (N.S.), 2 E. L. R. 414, it appeared that the defendant was arrested upon a Sunday on a warrant, issued some days before, for his arrest to answer a charge under the Canada Temperance Act. When brought before the magistrate upon the Sunday, the defendant, upon his own application for bail, made a deposit in lieu of bail, and was released, the hearing being set for a week day. On that day he appeared and secured an adjournment, leaving the deposit as bail for his appearance. The majority of the full Court held that s. 564 (3) of the Criminal Code was made applicable by s. 107 of the Canada Temperance Act, and therefore that the warrant could be executed on a Sunday; and, assuming the Sunday bailing to be illegal,

that the release of the defendant amounted to what is called a negligent escape, and there was nothing to prevent his being re-taken, or voluntarily surrendering himself, and therefore the magistrate had jurisdiction to proceed after the appearance of the defendant on the day set. It was also held that prohibition was not the proper remedy.

Dower.]—In Prince Edward Island counsel are fighting over the old Ontario battle-fields. For instance, in In re McIntyre (P.E.I.), 2 E. L. R. 305, we have a familiar contest and a ruling by Fitzgerald, V.-C., that the wife of a mortgagor who has joined in the mortgage to bar her dower is entitled out of the proceeds of sale free from her dower to a dower interest based upon the whole value of the land, and not merely upon the surplus over the mortgage. It was also decided that where the mortgage was before the Dower Act of 1899, the amount of a judgment against the mortgagor (also obtained before that Act) should be paid, out of the surplus proceeds of a sale by the mortgagee, in priority to the dower claim of the wife.

Fishery.]—Donnelly v. Vroom (N.S.), 2 E. L. R. 358, is an interesting case regarding the right of the public to dig clams from the sea shore between high and low water mark. The defendants claimed an exclusive right under a patent from the Crown, issued more than seventy years ago, which included the land down to low water mark, and also professed to grant the right of fishery. The plaintiff asserted the right of all the King's subjects to take shell-fish in this way. Before Magna Charta the Crown could grant an exclusive right of fishery to a private individual: the Great Charter restrained this prerogative for the future, but left untouched all fisheries which were made several to the exclusion of the public by act of the Crown not later than the reign of Henry II. In England, therefore, when an individual claims a several fishery in the sea or tidal waters, he must prove his right to it either by express grant before,

Magna Charta or by prescription from which such right will be presumed. In the opinion of Meagher, J., it is idle to speak in Nova Scotia, in the light of its history, and in relation to the time of the Great Charter in comparison with the arrival of the earliest settlers, of an appropriation of a several fishery in tidal waters by the Crown or by a private person so as to admit of an effectual grant thereof by the Crown. The grant here was not described to be in severalty, but, if it were so described, it would be invalid against other subjects, whatever its force may have been as against the Crown. The result was that the plaintiff, as one of the public, had a right to go on the flats and dig clams and take them away, and if, in the exercise of that right, to which the defendants' rights as owners of the soil were subject, he dug up the soil in places for the purpose of securing clams, he did only what he was lawfully entitled to do, and was not therefore liable in trespass for entering the flats, nor in trover for carrying away the clams.

Fixtures.]—A small wooden building placed on the defendant's land by his son, and sold by the son to the plaintiff, with the defendant's consent, was held by Graham, E.J., in Thompson v. Thompson (N.S.), 2 E. L. R. 401, not to be a fixture, the right of the defendant to assert that it was part of the realty being controlled by an agreement, when it was placed on the land, that it should remain personal property and be removable at its owner's pleasure.

Landlord and Tenant.]—A question of practical interest and importance was decided by the full Court upon a County Court appeal in Smith v. Thomas (N.S.), 2 E. L. R. 394. The defendant on the 11th November, 1905, rented a house from the plaintiff at $30 a month, for one year, beginning on the 15th November, from which date rent was to be payable. The defendant did not move into the house, and two months from the 15th November the plaintiff sued for two months' rent. There was nothing in writing, but the terms were not disputed. The Court held that the

transaction was not an agreement for a lease, but an actual lease or demise of the premises, and so not obnoxious to the Statute of Frauds.

Negligence.]—The decision of the full Court in Lott v. Sydney and Glace Bay R. W. Co. (N.S.), 2 E. L. R. 309, though chiefly turning upon a question of fact, is not without interest. The plaintiff, a child of nearly two years, was struck by a motor-car of the defendants upon the track and injured. The motorman saw the child about to go upon the track in front of the approaching car; he slowed up, and whistled. The child turned its head, apparently hearing the whistle, and the motorman, accepting this as sufficient, increased the speed, but the child hastened across the track, and the disaster took place. The trial Judge thought the defendants were not liable, and the dissenting Judge in the Court above agreed with him, but the majority were of a different opinion. "Where it is clear," said Weatherbe, C.J., "as it is on the evidence in this case, that the driver refused to wait an instant to observe whether the infant facing towards and close to what was likely to be its destruction would really retreat, but instantly increased the speed which caused the damage to the child, which merely pursued the course it had been and was likely to follow, no clearer case of carelessness and reckless conduct could happen. And the only excuse that can be offered emphasizes the weakness of the defence, namely, the urgency of complying with the time table and preventing the delay of passengers." It was also held that the absence of a fender was evidence of negligence.

Promissory Notes.]—Strict justice was done by the order made by Fitzgerald, V.-C., in Palmer v. Reilly (P.E.I.), 2 E. L. R. 309, upon an application by the plaintiff to strike out the defendant's pleas setting up the loss of two of the promissory notes sued upon, the plaintiff giving satisfactory security. Before action the plaintiff told the defendant of the loss of the notes, and offered him orally any required

indemnity. After action and before declaration the plaintiff's attorney wrote to the defendant's attorney making him a definite offer of indemnity; the latter did not answer, but filed the pleas setting up the loss of the notes. The plaintiff was clearly entitled under s. 69 of the Bills of Exchange Act, 1890, to the order asked, on payment of costs. But what costs? "I think," says the Vice-Chancellor, "that the defendant should be paid the costs of the suit up to the date of the letter, though no formal bond was then tendered. This is an equitable matter, and it is not fitting that after such an offer the defendant should remain silent and make costs by filing these pleas. As to the defendant's costs of this application, they must be paid by the plaintiff, as, until sufficient indemnity is actually given, the costs of settling it and ordering it must be paid by the party whose duty it was to give such indemnity."

Will.]—The testator whose will was in question in Ward v. McKay (N.S.), 2 E. L. R. 353, died leaving six children by his first wife and one by his second wife, who survived him. In the first part of the will he set forth what he had done for the children of his first marriage, and declared that four of them had "got all they are entitled to in and through my death;" to the fifth he left £10 "in full of all legitim portion executory or anything he can claim in or through my death;" and the sixth, whom he stigmatized as a "rebel," he "denuded of all claims in this deed." The remainder of his real and personal estate he gave to the child of his second marriage, providing that if that child (Andrew) should die before his (the testator's) wife, she was to have the benefit of his estate for her lifetime or widowhood, the remainder to be equally divided "among my first family or the survivors of them." All of the children died before the widow, Andrew at the age of 14, and before any of the others. It was held by the full Court that on the death of Andrew the remainder vested in the children of the first family, subject to this, that if there were survivors at the period of distribution (the death of the widow), it

would be diverted in favour of those survivors. But there being then no survivors, there was nothing to divert it, and it remained the property of the representatives of the children. The expressions in the will with regard to the children of the first family were regarded as merely explanatory of the giving of the whole estate to Andrew in the first place, and not as barring any of the first family from sharing as remaindermen upon the event which actually happened.

EDITORIAL REVIEW.

Recent Judicial Changes in Canada.

Mr. J. R. Brown, barrister-at-law, of British Columbia, has been appointed Judge of the County Court of Yale, in the room of Mr. Justice Clement, now a puisne Judge of the Supreme Court of British Columbia, and Mr. Frederick Calder becomes Judge of the County Court of Cariboo, British Columbia, in the place of Mr. Clement F. Cornwall, who has resigned. . . . In Ontario we note the death of Mr. J. J. O'Meara, junior Judge of the County Court of Carleton, and the appointment of Mr. R. D. Gunn, K.C., of Orillia, as his successor. This is an excellent appointment. . . . The resignation of Sir Robert L. Weatherbe, Chief Justice of the Supreme Court of Nova Scotia, is announced.

Court of Appeal for New Brunswick.

On the 15th February a bill was introduced into the Legislative Assembly of New Brunswick providing for a Court of Appeal separate from the Supreme Court. The bill provides for the reduction of the present number of Supreme Court Judges from six to four. The new Court will be composed of three Judges. Chief Justice Tuck, Mr. Pugsley explained, will remain Chief Justice of the Supreme Court, and will be known as the Chief Justice of New Brunswick. This means the appointment of another Judge. The provisions of the bill appear to be similar to those of the Act now in force in Manitoba.

King's Counsel in Scotland.

A report of the Committee of the Faculty of Advocates, Scotland, on the privileges, responsibilities, and restrictions affecting King's Counsel has been unanimously adopted by the faculty. The committee summarize the conclusions at which they have arrived: (1) Any counsel having the rank

of King's Counsel is entitled to lead any other counsel not having that rank; (1) inter se King's Counsel take precedence according to the date of their respective patents, with the exception of the Lord Advocate, the Dean of Faculty, and the Solicitor-General for the time being, and former holders of these offices in the same order; (3) a King's Counsel may give a written opinion, although a junior has not been instructed in the case; (4) a King's Counsel is not entitled to appear in any Court in Scotland in any case in which a junior has not been instructed to appear along with him; (5) a King's Counsel is not entitled to draw or revise pleadings in any case depending or to be called before any Court in Scotland, or to write appeal cases for the House of Lords, unless junior counsel has been instructed to act along with him; (6) there is no rule against a King's Counsel appearing in arbitration proceedings (whether statutory or not) unaccompanied by a junior; (7) it is the proper practice for King's Counsel to be accompanied by juniors before the provisional order tribunals, Board of Trade inquiries, Parliamentary and Royal Commissions, and departmental inquiries. Noblesse oblige: the office is very properly hedged about with restrictions suitable to maintain its dignity, and thus a barrister may well hesitate before he applies for admission to the rank of a King's Counsel. Such rules would not be suitable to our conditions and surroundings in Canada, and probably in time the distinction will become meaningless.

The Rights of Theatre-goers.

The disturbances that took place recently at the Irish Literary Theatre on the occasion of the performance of "The Playboy of the Western World," to which play a large section of the Dublin public took grave exception, have caused attention to be drawn to the rights that spectators possess who patronize dramatic entertainments. Chief Justice Bushe defined those rights very clearly in 1825 in Rex v. Forbes, 1 Cr. & Dix C. C. 157. In that case an informa-

tion had been filed by the Attorney-General against the traversers for a conspiracy to create a riot and to insult and assault the Lord-Lieutenant of the day at the Theatre Royal. His Lordship laid down the law to the jury as follows: "An audience at a theatre may cry down a play or other performance which they dislike, or they may hiss or hoot the actors who depend upon their approbation or their caprice. Even that privilege is confined within its limits. They must not break the peace, or act in such a manner as has a tendency to excite terror or disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That censure or approbation must be the expression of the feelings of the moment, for, if it be premeditated by a number of persons confederated beforehand to cry down even a performance or an actor, it becomes criminal." A good deal was said on this subject by the Judges in Gregory v. Duke of Brunswick, 6 M. & G. 953. It is a remarkable circumstance that from the earliest times the Dublin public seem to have reserved to themselves the censorship of plays and theatrical management. For the last 150 years scenes of riot and turbulence have frequently taken place in the Dublin theatres. In December, 1814, a series of terrible riots took place in the Crow-street Theatre, arising ostensibly out of the substitution of a play called "The Miller and His Men" for another called "The Forest of Bondy," but in reality out of the dislike which, on political grounds, the public had taken to Jones, the manager of the theatre. In April, 1819, another riot took place in the same theatre, arising through the dismissal by Jones of a Miss Byrne, who was a popular singer of the time. Public feeling was at last, after many turbulent scenes, pacified by the re-engagement of the lady. (The London Law Times.)

Death of Lord Davey.

Lord Davey died early this month at his London residence, of acute bronchitis following on influenza. Horace Davey, Baron Davey of Fernhurst, was in his seventy-fourth

year. He was the third son of the late Mr. Peter Davey, of Horton, Buckinghamshire. He was educated at Rugby and at University College, Oxford. His university career included a first class in classics and in mathematics, the Senior Mathematical Scholarship, and the Eldon Law Scholarship; and he was elected a Fellow of his college in 1856. As standing counsel to the university he maintained his connection with Oxford in later life. He was called by Lincoln's-inn in 1861, and read in the chambers of Mr. (afterwards Vice-Chancellor) Wickens. He devoted himself to Chancery work, and took silk in 1875. Five years later he was returned to Parliament in the Liberal interest as member for Christchurch, Hants. On the formation of Mr. Gladstone's Government in 1886 he was appointed Solicitor-General, although he had lost his seat in the election in the previous year. He received the honour of knighthood, but he remained without a seat until he was elected for Stockton in 1888. Four years later he again failed to secure re-election. In 1893 he was appointed a Lord Justice of Appeal, and in the following year he accepted a life peerage as a Lord of Appeal. Lord Davey took part in a number of famous cases, among them being that of Mogul Steamship Company, Boswell v. Cokes, Erlanger v. New Phosphate Company, and the Berkeley Peerage case in 1891. He was also counsel for the prosecution at the trial of the Bishop of Lincoln. He delivered judgment in the Kempton Park betting case, and it is within general recollection that he was indirectly responsible for the new Street Betting Act. As Sir Horace Davey, he appeared frequently before the Judicial Committee in cases from Canada, and was well known to many Canadians.

The following appreciation is from the London Law Times: "The Bench has lost one of its most learned members by the death of Lord Davey. His success, both at the Bar and as a Judge, could not be attributed to any accident of fortune, or to any of those dazzling gifts of utterance,

which so often cover deficiencies in more solid qualities. His arguments at the Bar were appeals to reason and learning alone, and his judgments from the Bench were always marked by quiet dignity and logical expression. It has been said that as an advocate his habit was to employ his arguments in an ascending scale of importance, and to gradually impress upon the Court a deepening conviction in his favour, rather than to risk his best points before he had made a preliminary impression. Whether this be so or not, his great success stamped him as worthy of a place within the most select group of British lawyers."

Simplification of Legal Language.

Some five or six years ago, according to a writer in l'Eclair, M. Henri Breal, who is connected with the Paris Court of Appeal, undertook the task of abolishing the "judicial jargon," and of replacing it by simple language such as the layman who seeks the aid of the law can understand. Accordingly a commission was appointed in 1902, and three years later inquiries were made in all parts of France with a view to ascertain local legal opinion on the scheme. The result of the referendum was strikingly in favour of reform, the actual figures being 726 as against 159 opponents of any change. Legal documents are to be made clear—or at any rate more intelligible—to the uninstructed from the first word to the last. In short, wherever a "barbarous" word is at present used, it will either be replaced by a more simple and modern equivalent, or, if this is impracticable, it will be explained by a marginal note. For instance, the expression "avant trois jours francs" is interpreted as meaning "avant cinq jours." Such are the broad lines on which this long-needed reform is based. It may be expected to come into full force with the legal year of 1908. M. Breal's next task, in the event of the success of his present modest effort, will be to attempt something far more serious—the reform of the Code of Procedure, which

has not been altered in any way since the time of Colbert, 1680 being the precise date. (The London Law Times.)

Recent American Decisions.

Carriers.—A driver travelling on a stock pass is held, in Lake Shore & M. S. R. Co. v. Teeters (Ind.), 5 L. R. A. (N.S.) 425, to be a passenger for hire, within the rule forbidding the carrier to contract for an exemption from liability for its negligence.

A railway company is held, in Davis v. Chesapeake & O. R. Co. (Ky.), 5 L. R. A. (N.S.) 458, not to lose its character of common carrier by a special contract to transport over its road the messengers and packages of a particular express company, although it could not have been compelled to undertake such transportation.

Insurance.—A present contract of insurance is held, in Whitman v. Milwaukee F. Ins. Co. (Wis.), 5 L. R. A. (N.S.) 407, not to be effected by signing an application, followed by the statement of the agent that he would "see to it, take care of it, so it would be all right," would "get a policy."

An injury received by making an intentional assault on another by striking him in the face with the fist is held, in Fidelity & C. Co. v. Carroll (C. C. A. 4th C.), 5 L. R. A. (N.S.) 657, not to be by accidental means, within the meaning of a policy insuring against injuries received through such means.

The issue of a policy of life insurance for $5,000, upon an application for $10,000, is held, in New York L. Ins. Co. v. Levy (Ky.), 5 L. R. A. (N.S.) 739, to be a rejection of the proposition of the applicant, and not binding upon the insurer until assented to by the applicant.

An incontestable clause in an insurance policy is held, in Bromley v. Washington L. Ins. Co. (Ky.), 5 L. R. A. (N.S.) 747, not to prevent the insurer from resisting pay-

ment on the ground that it was issued to one having no insurable interest, and is therefore void as against public policy.

Master and Servant.—A servant employed for an entire term at wages payable in instalments at stated intervals is held, in Smith v. Cashie & C. R. & L. Co. (N. C.), 5 L. R. A. (N.S.) 439, to be entitled, upon being wrongfully discharged, to treat the contract as existing, and sue at each period of payment for the salary then due. The right of wrongfully discharged servant to recover wages for contract period subsequent to discharge is the subject of a note to this case.

The wilful default of the manager of a farm to submit accurate accounts to his employer, as required by his contract, is held, in Sipley v. Stickney (Mass.), 5 L. R. A. (N.S.) 469, to deprive him of his right to recover his stipulated wages, although it results in no injury to the employer.

Where a contract for service is an entire one, and not severable, and a servant is lawfully discharged for disobedience of the reasonable orders of the master, he is held, in Von Heyne v. Tompkins (Minn.), 5 L. R. A. (N. S.) 524, not to be entitled to recover for his services. A note to this case reviews the other authorities on rights and remedies of servant discharged for good causes.

Negligence.—The collision of an express waggon with the hind wheel of a waggon being loaded from the sidewalk, forcing it against the horse, which was standing unhitched in the street, and causing the animal to run away, is held, in Collins v. West Jersey Express Co. (N. J. Err. & App.), 5 L. R. A. (N. S.) 373, to be the proximate cause of an injury to one who, to avoid the horse, jumped aside and broke his leg by falling over a board pile in the street.

Release.—A release obtained by the physician of one causing injury by negligence, from the injured person, after he has taken charge of the case and gained the patient's confidence by his apparent friendship and solicitude for his

welfare, is held, in Viallet v. Consolidated R. & P. Co. (Utah), 5 L. R. A. (N. S.) 663, to be properly set aside, where the injured person relied on his statements and assurances as to the nature and probable duration of the injury, which were reckless and proved untrue, and had a tendency to deceive and mislead, and were made for the purpose of inducing the settlement.

False representations made by a surgeon of a railway company as to the extent of the injuries of an employee are held, in Gulf, C. & S. F. R. Co. v. Huyett (Tex.), 5 L. R. A. (N. S.) 669, to be no reason for setting aside a release subsequently obtained by a claim agent, although the employee acted on the information so received in signing the release, if the claim agent did not knowingly take advantage of such fact.

PERIODICALS AND PAMPHLETS.

Dominion of Canada Labour Gazette (Ottawa, February, 1907.) "Labour Organization in Canada during 1906;" "Changes in Rates of Wages and Hours of Labour during the Fourth Quarter of 1906;" "Industrial Betterment at Berlin, Ont.—Welfare Work of the Williams, Greene, & Rome Co.;" "Intercolonial Railway Employees Provident Fund;" "The Late D. J. Donoghue;" "Co-operative Bank at Levis, Que.;" "Recent Legal Decisions affecting Labour."

Maple Sugar and Syrup—Importance of the Industry and Manufacture of Pure Maple Sugar and Syrup (Department of Agriculture, Ottawa, Canada, Bulletin No. 1 B.)

Canadian Municipal Journal (Montreal, January, 1907.) "Should Municipal Utilities Reduce Taxation?" "Should Municipal Waterworks be Metered?" by C. L. Wain, C. E., City Engineer, Kamloops, B. C.; "The Origin of Municipal Institutions," by J. D. Swanson, B.A., City Solicitor, Kamloops, B. C.; "The Proposed New Municipal Act for British Columbia," by the Mayor of Victoria, B. C.; "Uniform Municipal Accounting," by Graham Roseman, City Clerk, Enderby, B. C.; "The Housing of the Working Classes," by H. B. Ames, M. P., Montreal.

Columbia Law Review (March, 1907). "Conditions in Contracts," by George P. Costigan jun.; "The Treaty-making Power and the Reserved Sovereignty of the States," by Arthur K. Kuhn; "A Historical Sketch of Mohammedan Jurisprudence," by Abdur Rahim.

Harvard Law Review (March, 1907). "Crucial Issues in Labour Litigation, II.," by Jeremiah Smith; "The Right of a Seller of Goods to Recover the Price," by Samuel Williston; "Equitable Interests in Foreign Property," by Joseph H. Beale jun.

Case and Comment (Rochester, N.Y., February, 1907). "Acquiring Territory by Treaty;" "Applicability of Rule Res Ipsa Loquitur as between Master and Servant."

Albany Law Journal (December, 1906). "Current Topics;" "In Memoriam Chief Justice Richard A. Alvey;" "International Collections," by the Hon. W. L. Penfield.

Natal Law Quarterly (31st December, 1906). "Mr. John Parker Waller;" "The House of Lords and Privy Council as Final Courts of Appeal;" "The New Magistrates' Court Rules."

Criminal Law Journal of India (Lahore, 30th January, 15th February, 1907.) "Some Contributions of Psychology to the Conception of Justice," by James H. Tufts, of the University of Chicago; "Disturbing the Peace;" "The Young Lawyer."

Madras Law Times (Vol. 1, Nos. 19-24.) "Mr. Justice Ashutosh Mookerjee," by S. C. Dey; "Testamentary Powers of a Hindu Widow over Property Inherited by her from her Husband;" "Marriage and Divorce in France," by J. C. Adam; "Legal Ethics," by F. P. Pritchard.

Madras Law Journal (November, December, 1906, January, 1907.) "Some Questions on the Insolvency Law;" "Some Topics of Insolvency Law in its International Aspect."

Criminal Law Notes (Pawatipur, Madras, November, 1906.) "Corporal Punishment in India—Prison Mortality," by Sir Henry Cotton, K.C.S.I.

Federal Reporter (National Reporter System, 7th, 14th, 21st, 28th February, 7th March, 1907.)

General Digest American and English (Monthly Advance Sheets, Rochester, N.Y., December, 1906, January, 1907.)

Central Law Journal (St. Louis, Mo., 22nd February, 8th March, 1907.)

Chicago Legal News (16th, 23rd February, 2nd, 9th March, 1907.)

Chicago Law Journal (8th, 15th, 22nd February, 1st March, 1907.)

Law Notes (Northport, N.Y., March, 1907.)

Calcutta Weekly Notes (21st, 28th January, 4th February, 1907.)

OCCASIONAL NOTES.

Supreme Court of Canada.

EXCHEQUER COURT.] [5TH DECEMBER, 1906.

CANADIAN PACIFIC R. W. CO. v. THE KING.

Crown—Canal bridge — Agreement between Crown and company as to construction — Liability for maintenance and operation — Order in council.

The appellants applied for liberty to build a bridge over the Otonabee, a navigable river, undertaking to construct a draw in it, should the government deem it necessary. An order in council was passed providing that "the company shall construct either a swing in the bridge now in question, the cost to be borne by themselves, or else a new swing bridge over the contemplated canal (Trent Valley Canal), in which case the expense incurred, over and above the cost of the swing itself and the necessary pivot pier therefor, shall be borne by the government." A new swing bridge was constructed over the canal by agreement with the company.

Held, that the words "the cost of the swing itself and the necessary pier" included, under the circumstances and in the connection in which they were used, the operation and maintenance also of the swing by the company.

Judgment of the Exchequer Court, 26 C. L. T. 777, affirmed.

F. H. Chrysler, K.C., for the appellants.

E. L. Newcombe, K.C., for the Crown.

EXCHEQUER COURT.] [19TH FEBRUARY, 1907.

THE "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Ship — Admiralty law—Foreign bottoms—Collision in foreign waters—Jurisdiction.

A foreign vessel passing through a river dividing Canada from the United States, under a treaty allowing free passage to ships of both nations, is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Court of Admiralty. The warrant to arrest a foreign vessel cannot be issued until she is within the jurisdiction of the Court.

Quaere, have the Courts of Admiralty in Canada the same jurisdiction as those in England to try an action *in rem* by one foreign ship against another for damages incurred by a collision in foreign waters?

Judgment of the Exchequer Court, Toronto Admiralty District, 10 Ex. C. R. 1, reversed; IDINGTON, J., dissenting.

W. D. McPherson, for the appellants.

J. W. Hanna, for the respondents.

ONTARIO.] [11TH DECEMBER, 1906.

HAMILTON BRASS MANUFACTURING CO. v. BARR CASH AND PACKAGE CARRIER CO.

Account—Statute of Limitations—Agents or partners—Reference—Practice—Appeal.

By agreement between them, the Hamilton Brass Manufacturing Co. were appointed agents of the Bar Cash and Package Carrier Co. for sale and lease of their carriers in Canada, at a price named for manufacture, net profits to be equally divided and quarterly returns to be furnished, either

party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years, when the Barr Co. sued for an account, alleging failure to make proper returns and payments.

Held, GIROUARD and DAVIES, JJ., dissenting, that the accounts should be taken for the six years preceding the action only.

On a reference to the Master, the taking of the accounts was brought down to a time at which the defendants contended that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report.

Held, that this was a matter of practice and procedure, as to which the Supreme Court would not entertain an appeal.

Judgment of the Court of Appeal in *Barr Cash and Package Carrier Co.* v. *Hamilton Brass Manufacturing Co.*, 6 O. W. R. 643, reversed.

G. Lynch-Staunton, K.C., for the appellants.

H. D. Gamble and *H. L. Dunn,* for the respondents.

ONTARIO.] [19TH FEBRUARY, 1907.

TORONTO R. W. CO. v. MULVANEY.

Negligence—Street railway—Injury to person crossing track and consequent death—Excessive speed—Gong not sounded—Contributory negligence—Findings of jury—Action under Fatal Accidents Act—Damages—Expenses incurred by father of deceased.

A passenger on a street car in Toronto, going west, alighted on the side furthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow, and seeing a car coming from the west as she was about to step on the track she recoiled and at the same time the car she

had left started and she was crushed between the two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the defendants were negligent in running the east bound car at excessive speed and not sounding the gong before starting the west bound car. They found also that the deceased was negligent, but that the defendants could, nevertheless, have avoided the accident by the exercise of reasonable care.

Held, that the case having been submitted to the jury with a charge not objected to by the defendants, and the evidence justifying the findings, the verdict for the plaintiffs should not be disturbed.

The plaintiffs should not have had the funeral and other expenses incurred by the father of the deceased allowed as damages in the action.

Judgment of the Court of Appeal in *Mulvaney* v. *Toronto R. W. Co.*, 7 O. W. R. 644, affirmed.

W. Nesbitt, K.C., for the appellants.

N. F. Davidson, for the respondents.

ONTARIO.] [19TH FEBRUARY, 1907.

BANK OF MONTREAL v. THE KING.

Bills and notes—Forged cheques—Crown—Forgeries by clerk in government department—Payment by bank—Negligence—Liability to customer—Estoppel—Deposit of cheques in other banks—Liability over—Mistake.

A clerk in a department of the government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawees to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the Bank of Montreal. None

of the cheques were marked with the drawees' acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General:—

Held, affirming the judgment appealed from, *Rex* v. *Bank of Montreal,* 11 O. L. R. 595, 7 O. W. R. 638, that the Bank of Montreal were liable unless the Crown was estopped from setting up the forgery.

Per DAVIES, IDINGTON, and DUFF, JJ., that estoppel could not be invoked against the Crown.

Per GIROUARD and MACLENNAN, JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case a private person would not have been estopped had his name been forged as drawer of the cheques.

Per DAVIES and IDINGTON, JJ., that the acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, was subject to being re-opened to have the mistake rectified.

The defendants made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held:—

Per GIROUARD and MACLENNAN, JJ., that the drawees, having paid the cheques on which the name of their customer was forged, could not recover the amounts thereof from holders in due course.

Price v. *Neal,* 4 Burr. 1355, followed.

Per DAVIES and IDINGTON, JJ., that, as the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out the funds to their depositor or on his order, the drawees were estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake.

In the result, the judgment appealed from was affirmed.

G. F. Shepley, K.C., *J. J. Gormully,* K.C., and *J. F. Orde,* for the defendants.

A. B. Aylesworth, K.C., A.-G., and *J. H. Moss,* for the Crown.

Lafleur, K.C., and *R. B. Matheson,* for the Quebec Bank.

G. F. Henderson and *A. W. Greene,* for the Royal Bank.

J. A. Ritchie, for the Sovereign Bank.

ONTARIO.] [13TH MARCH, 1907.

SAUNDERS v. THE KING.

Criminal law—Keeping common betting house—Book-makers in charge of betting booth on racecourse of incorporated association—"House, office, room, or other place"—Movable structure—Criminal Code, ss. 197, 198, 204.

Appeal by the defendants in *Rex* v. *Saunders* from the judgment of the Court of Appeal, 12 O. L. R. 615, 8 O. W. R. 534, affirming a conviction of the defendants for keeping a disorderly house, to wit, a common betting house.

The appeal was heard by FITZPATRICK, C.J.C., GIROUARD, DAVIES, IDINGTON, MACLENNAN, and DUFF, JJ.

C. H. Ritchie, K.C., and *J. M. Godfrey,* for the appellants.

J. R. Cartwright, K.C., for the Crown.

FITZPATRICK, C.J.C.:—The offence with which the defendants were charged before the police magistrate was, as

stated in the reserved case, that of keeping a disorderly house, to wit, a common betting house. Section 197 of the Criminal Code defines a common betting house "as a house, office, room, or *other place* opened, kept, or used for the purpose of betting between persons resorting thereto and the owner, occupier, or keeper thereof."

Section 198 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps a common betting house as hereinbefore defined.

It has been found as a fact by the police magistrate, admitted by all the Judges below, and not seriously denied by counsel for the defendants at the argument here, that the betting booth used by the defendants must be held upon the authorities (Powell v. Kempton Park Racecourse Co., [1897] A. C. 143, and Brown v. Patch, [1899] 1 Q. B. 892), to be *a place* within the meaning of s. 197. The defendants were convicted by the police magistrate on the ground that to use such a betting booth as was described by the witnesses for the purpose of betting between persons resorting thereto, and the owner, occupier, or keeper thereof, is an indictable offence under ss. 197 and 198 of the Criminal Code. On a reserved case the conviction was upheld by the Court of Appeal for Ontario, Meredith and Garrow, JJ.A., dissenting. It was not denied that the defendants used the booths in question for the purpose of betting with all comers, but it was put forward as a defence to the charge that the booths or movable stands having been erected on the premises of an incorporated racing association to be used for the purpose of making bets during the actual progress of a race meeting, brought the defendants within the proviso of s. 204.

Section 204 declares every one guilty of an indictable offence, who:

(a) Uses or knowingly allows any part of any premises under his control to be used *for the purpose of recording or registering any bet or wager* or selling any pool, or

(b) Keeps, exhibits, or employs in any part of any pre-

mises under his control any device or apparatus *for the purpose of recording any bet or wager,* etc., or

(c) Becomes the custodian or depositor of any money . . . wagered, or

(d) Records or registers any bet or wager.

By s.-s. 2 of s. 204, it is expressly declared that the provisions of the section shall not extend to bets between individuals or to *bets made on the racecourse of an incorporated association during the actual progress of a race meeting.* These words were added as an amendment when the Criminal Code was enacted in 1892.

Bets between individuals are not illegal at common law, and the provisions of this section do not extend to bets between individuals, or to bets made on the racecourse of an incorporated association during the course of a race meeting. I quite agree that the amendment of 1892 was intended to reserve the racecourses of incorporated associations as places where bets might be recorded and registered, and any apparatus or structures used for the more conveniently recording such bets or wagers, provided this was done during the actual progress of a race meeting, were exempted from the operation of that section.

But to use a place for the purpose of recording or registering bets or wagers is something entirely different from using a place for the purpose of betting between persons resorting thereto and the owner or occupier thereof.

Bets between individuals or bets made on the racecourse of an incorporated association during the actual progress of a race meeting can be recorded in any place used for that purpose, but to keep a place, whether within or without the grounds of a racing association, for the purpose of betting, whether during the progress of a race meeting or not, is an offence under s. 197.

In my opinion, two distinct and separate statutory offences are created by ss. 197 and 204, and that which may be in-

voked successfully as a defence in one case cannot avail in the other. To keep a place for making bets which may be recorded at that place or elsewhere, and to keep a place for recording bets wherever made, are distinct and separate acts, each of which have been made offences, and each of which are declared to subject the offenders to different penalties. The exception created by s.-s. 2 of s. 204 with respect to anything therein, does not apply to those places that are kept for the purpose of betting. I do not understand the rule of construction to be that all the sections of the Code dealing with nuisances are to be read together to see how they can be made to harmonize, any more than the sections dealing with offences against the person or against property. Distinct and separate acts are by these sections declared to be common nuisances, and the only question to be considered is, do the facts proved in evidence support the charge as laid in each particular case?

No useful purpose can be served by going over the ground already covered by the Chief Justice of Ontario in the Court of Appeal. I quite agree with him that the intention of Parliament, which can only be gathered from the language it has used, was to exempt from the operation of s. 204 betting on racecourses controlled by incorporated associations during the actual progress of a race, but not to sanction the existence of betting houses on such racecourses at such times and under such circumstances. Section 197 makes no exception; at all times and under all circumstances betting houses are prohibited; and it is not for this Court to introduce into this clause qualifying expressions which the legislature has not chosen to put there.

The appeal is dismissed with costs.

IDINGTON, MACLENNAN, and DUFF, JJ., concurred.

DAVIES, J.:—While I concur with the judgment of the Court of Appeal in their answer to the first question of the case submitted, that a betting booth such as that described in

the case falls within the terms of s. 197 of the Criminal Code as a house, office, or other place; I am not able to concur with the majority of that Court in holding that the provisions of s.-s. 2 of s. 204 do not apply to the offence of which the defendants were found guilty so as under the circumstances and conditions to exempt them from liability to conviction.

Mr. Justice Osler concurred with the majority on this point, considering himself bound by previous decisions of the same Court, but without, as he himself says, being called upon to consider whether these decisions were sound or not, Apart from him the Court was equally divided.

I concur in the conclusions reached by Garrow and Meredith, JJ.A., that the conviction should be quashed on the ground that the provisions of s.-s. 2 of s. 204 must be read as applying to the offence of which the defendants were convicted.

I agree with Garrow, J.A., when he says: "The proper construction, in a word, is, in my opinion, to hold that ss. 197-198 have no application to the case of betting carried on upon the racecourse of an incorporated association during the actual progress of a race meeting, whether or not such betting takes place within or without doors or in any particular 'house, office, room, or other place,' so long as it is within the boundaries of the racecourse, and so long as the betting is confined to the races then in progress upon that racecourse.

The history of the two ss. 197 and 198 and of s. 204 of the Criminal Code, so far as it seems desirable to know it for the purposes of this argument, is that s. 204 formed a part of the criminal law for years before 1892, when the Code was enacted, but without the latter words of the exempting sub-section, on which this controversy turns, namely, betting when "made on the racecourse of an incorporated association during the actual progress of a race meeting." These words were added to s. 204 at the time the Code was enacted,

and ss. 197 and 198 were also then for the first time introduced into our criminal law.

These two new sections, 197 and 198, define a common betting house and declare it to be illegal and a disorderly house.

It is a defined place "opened, kept, or used for the purpose of betting between persons resorting thereto and the owner, occupier, or keeper, or opened, kept, or used for the purpose of any money being received by or on behalf of any such person as and for the consideration of any bet on any race," etc.

The object and purpose of Parliament in enacting the several sections of the Criminal Code under review was, no doubt, the suppression of betting and pool-selling between professional book-makers and pool-sellers and their patrons. To that end ss. 197 and 198, defining and penalizing the keeping of a common betting house for the purpose of betting or for the purpose of receiving any money by the keeper of such house for or in connection with any bet, were no doubt introduced into the Code when it was passed in 1892. To more effectually ensure the carrying out of the same objects s. 204 of the then criminal law was retained, penalizing the using of any part of any premises under his control by any one for the purpose of recording any bet or wager or for the purpose of becoming the custodian or depositary of any money staked or wagered upon the result of any election, race, or trial of skill or endurance, but it was so retained with an additional and important exemption added. That exemption included three specific kinds of betting, even when done by the class of persons struck at in the penalizing parts of the section. First, betting when the bet or stake was payable to the winner of any race or game, or to the owner of any horse engaged in a lawful race, and not to the book-maker or pool-seller; secondly, betting between individuals. These still remained perfectly lawful. So long as the person struck at (the pool-seller or book-maker using a proscribed place

to carry on his calling) was not a party to the bet or a possible beneficiary of the bet, so long as the practices by or through which such person carried on his calling which Parliament aimed to suppress were not involved, neither the bet nor anything incidental to it was prohibited; and thirdly, introduced for the first time as an exemption, betting "made on the racecourse of an incorporated association during the actual progress of a race meeting."

This latter exemption covered book-makers as well as other individuals, and left betting with book-makers and pool-sellers using premises under their control to record bets and to receive stakes, legal, when carried on within the limitations specified in the exempting words.

But, if the substantive act of using part of any premises to receive deposits or stakes of a bet, as well as to record such bet or any number of such single bets, were thus permitted when done at the special places, times, and on the races specified in the exemption, how can it be contended successfully that any other necessary or ordinary incident or act in the carrying on of the main substantive thing permitted, such as holding himself out at a particular place for the purpose of doing the act, continued to be an offence?

It must be conceded that the using of a part of the race premises such as a betting booth or house for the purpose of recording bets, and there receiving stakes and deposits or the money representing the bets upon the result of any race, when the betting and recording and money received were all done and happened on the racecourse of an incorporated association during the actual progress of a race meeting, and with reference alone to one of the races at that meeting, was permitted by s.-s. 2 of s. 204. Now, what are these limited acts as to time, place, and event, so permitted and not prohibited, but the keeping of a common betting house on the racecourse, but exclusively for the races being run there?

I think, for the purpose of construing the exemption clause the three sections must be read together, and that, so far as

that exemption clause extends to sanction or allow any act which otherwise would be illegal, it must be read as covering that act, even if the act is made an offence by both sections.

In my opinion, the special privilege or permission conceded by the sub-section to carry on betting in a special place, at a special time, and with reference to special races, necessarily permitted all acts ordinarily essential to the carrying out of the substantial purpose.

If the amendment made to the exempting sub-section contemporaneously with the introduction of the new sections 197 and 198, penalizing the common betting house, did not operate to exempt betting made and recorded at such house or place, when confined within the limitations expressed in the amendment, then it appears to me to be quite meaningless, because all betting made between individuals had already been exempted, as also all bets which were payable to the owner of the horse racing. The only effect of the amendment could be to extend the sanction of the clause to betting at the common betting house made between the keeper of the house and outside persons, when erected on the race grounds, and which betting was confined within the special limitations expressed in the amendment.

Keeping a house or place for the purpose of betting between persons who resort thither to bet with the keeper of such house or place is an indictable offence within s. 197 of the Code, but it is not such an offence when it is kept on the grounds of an incorporated race association, and the sole and exclusive purpose for which it is kept is for the special classes of betting defined and limited by the sub-section of 204.

I would, therefore, allow the appeal and answer the first question of the case submitted in the affirmative and the second in the negative.

GIROUARD, J., concurred with DAVIES, J.

NOVA SCOTIA.] [15TH DECEMBER, 1906.

WOOD v. ROCKWELL.

Trial—Jury—Judge's charge—Practical withdrawal of case—Evidence—New trial.

On the trial of an action against a surety the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial Judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability, they could find for the defendant, he knew of no such evidence, and it was not to be found in the case.

Held, that the disputed facts were practically withdrawn from the jury, and, as there was evidence proper to be submitted and on which they might reasonably find for the defendant, there should be a new trial.

Appeal allowed with costs, and new trial ordered.

Roscoe, K.C., for the appellant.

W. B. A. Ritchie, K.C., for the respondent.

NOVA SCOTIA.] [26TH DECEMBER, 1906.

UNION BANK OF HALIFAX v. SPINNEY.

Banks and banking—Security on goods—Sale by assignor—Bank's right to proceeds—53 V. c. 31, s. 74 (D.)

C., obtaining advances from a bank to enable him to pay for goods to be used in manufacture, assigned such goods to the bank under s. 74 of the Bank Act, 1890. A cargo having arrived, when the bank notified C. that further advances

would be refused, he induced the manager, by promise of customers' paper as collateral, to give him the sum necessary to pay for it, and immediately after went to S., who had indorsed for him and was liable on a note for $2,800, and gave him a statement of his affairs and agreed to hand him the notes he would receive on selling the goods, which he did, and S. collected the notes. The bank sued S. for the amount so collected.

Held, that S. had knowledge, or it would in law be imputed to him, of the bank's claim, and they could recover.

Appeal allowed with costs.

Harris, K.C., for the appellants.

W. B. A. Ritchie, K.C., for the respondent.

NOVA SCOTIA.] [26TH DECEMBER, 1906.

McNEIL v. FULTZ.

Breach of contract—Breach of trust—Assessment of damages—Sale of mining areas—Promotion of company—Failure to deliver securities—Principal and agent—Account—Evidence — Salvage — Indemnity for necessary expenses—Laches—Estoppel.

The plaintiffs transferred certain mining areas to the defendant in order that they might be sold, together with other areas, to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendant agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money, and the lender exacted a bonus in stock and bonds, which the defendant gave him out of those he received for convey-

ance of the properties to the company. After deducting a ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of the proportion of stock and bonds to which they were entitled, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of their shares and bonds until some time afterwards, when they brought the action to recover the securities or their value.

Held, affirming the judgment appealed from, *Fultz* v. *McNeil,* 38 N. S. R. 506, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to indemnify himself for expenses necessarily incurred in the preservation of the properties, and that, under the circumstances, the failure to demand the delivery of the remainder of the securities before action did not deprive the plaintiffs of the right to recover.

If the defendant was to be considered a trustee wrongfully withholding securities which he was bound to deliver, he was liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he was to be regarded as a contractor who had failed to deliver the securities according to the terms of his agreement, he was liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose.

Nant-Y-Glo and Blaina Ironworks Co. v. *Grave,* 12 Ch. D. 738, *The Steamship Carrisbrooke Co.* v. *London and Provincial and General Ins. Co.,* [1901] 2 K. B. 861, and *Michael* v. *Hart & Co.,* [1902] 1 K. B. 482, followed.

W. Nesbitt, K.C., and *J. J. Gormully,* K.C., for the appellant.

H. Mellish, K.C., for the respondents.

NEW BRUNSWICK.] [26TH DECEMBER, 1906.

ST. JOHN PILOT COMMISSIONERS v. CUMBERLAND RAILWAY AND COAL CO.

Ship—Pilotage—Port of St. John, N.B.—Ships propelled wholly or in part by steam—Coal barges towed—R. S. C. c. 80, ss. 58, 59.

Coal barges towed by steamers or tugs between the ports of Parsboro, N.S., and St. John, N.B., are exempt from compulsory pilotage at the latter port, even though under favourable conditions they could be navigated as sailing ships.

Judgment appealed from, 37 N. B. R. 436, affirmed.

McAlpine, K.C., and *Coster*, K.C., for the appellants.

McLean, K.C., for the respondents.

NEW BRUNSWICK.] [19TH FEBRUARY, 1907.

ALLCROFT v. ADAMS.

Master and servant—Wrongful dismissal—Contract of hiring—Capacity—Statute of Frauds.

The manager of a veneer company, having heard of the plaintiff as likely to be useful in the business, wrote to him saying: "What we want is a man who is a good veneer maker and knows how to make all kinds of built-up woods that are saleable. We want you to take full charge of the mill, that is, the manufacturing." The plaintiff answered: "I understand fully the making of such articles as you speak of as well as others;" and in a later letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the business). I can at all times lay my hands on good competent machine men who know their business, as also instruct those who do not." Subsequently the

plaintiff was hired by the company, but was dismissed in six weeks.

Held, reversing the judgment of the Supreme Court of New Brunswick, 37 N. B. R. 332, IDINGTON, J., dissenting, that the plaintiff was not hired as a general manager of the company's business, but as an expert in veneer work, and, as the evidence shewed that he was not competent, he was rightly dismissed.

Held, also, that the defendants could not rely on the Statute of Frauds, which, though pleaded, was not set up at the trial nor before the Supreme Court of New Brunswick *en banc.*

Fred. R. Taylor, for the appellants.

Teed, K.C., and *Jonah,* for the respondent.

NORTH-WEST TERRITORIES.] [28TH FEBRUARY, 1907.

GILBERT v. THE KING.

Criminal law—Murder—Evidence—Admissibility—Statements of deceased—Res gestæ—Subsequent statement—Presence of accused—Judge's charge—Reserved case—Dissenting judge—Appeal.

Evidence of statements made immediately after an assault of a person, since deceased, under apprehension of further danger and requesting assistance and protection, is admissible as part of the *res gestæ*, even though the person accused of the offence was absent at the time when such statements were made.

Regina v. *Beddingfield,* 14 Cox C. C. 342, *Regina* v. *Foster,* 6 C. & P. 385, and *Aveson* v. *Kinnaird,* 6 East 188, followed.

Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence and

hearing of the accused, and under such circumstances that he might reasonably have been expected to have made some explanatory reply or remark in reference to them, are admissible as evidence.

On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun shot wound inflicted through the discharge of a gun in the hands of the accused, and the defence was that the gun had been discharged accidentally.

Held, that, in view of the character of the defence and the evidence in support of it, there could be no objection to a charge by the trial Judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either for acquittal or one of guilty of murder.

Two questions were reserved by the trial Judge for the opinion of the Court of Appeal, but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been taken at the trial. The Court of Appeal took all three questions into consideration, and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the Judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved.

On an appeal to the Supreme Court of Canada, the majority of the Court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the Court appealed from, but it was held:—

Per GIROUARD, J., that the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the Court appealed from.

McIntosh v. *The Queen*, 23 S. C. R. 180, followed.

Viau v. *The Queen*, 29 S. C. R. 90, *Union Colliery Co.* v. *The Queen*, 31 S. C. R. 81, and *Rice* v. *The Queen*, 32 S. C. R. 480, referred to.

Judgment of the Court below, *Rex* v. *Gilbert*, 5 W. L. R. 295, affirmed.

F. H. Chrysler, K.C., and *Balfour*, for the appellant.

F. R. Latchford, K.C., for the respondent.

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THE
CANADIAN LAW TIMES.

APRIL, 1907.

GHOSTS IN LITIGATION.

ONE of those unique cases which are every now and then arising came recently before the Court of King's Bench in Manitoba.

A policeman made an entry in the "Occurrence Book" kept at the police station as follows:—

"Second house east of Marie, on St. John's avenue, is believed by some people to be haunted at night between 11 and 12 midnight. There are parties of men hanging around this house, also in basement, awaiting the appearance of the spook. This house is at present unoccupied."

This was a perfectly legitimate entry made in the course of duty, and contained information which it was proper to be known to the police force; but it so happened that the enterprising reporter of a newspaper saw the entry, and was so captivated by it as an item of interest to the public, that he forthwith proceeded to dress it up for public consumption as follows:—

"*A North End Ghost:* There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John's avenue, near to Marie. He appears late at night and performs strange antics so that timid people give the place a wide berth. A number of men have lately made a stand against ghosts in general, and at night they rendezvous in the basement and

close around the haunted house to await his ghostship, but so far he still remains at large."

And before passing from this notice it is interesting to observe how an item of intelligence may develop in the hands of the imaginative and not too scrupulous purveyors of so-called "news." The police report was that the house "is believed by some people to be haunted," whereas the reporter is able to assure his readers of the absolute and positive existence of the ghost. Not only is he an actual fact, but "he is causing a lot of trouble," although it does not appear from the police report that any trouble was caused to anybody whatever. Then it is positively asserted that "he performs strange antics," although the police report is absolutely silent as to his performing any antics, strange or otherwise. Furthermore, the reporter is able to assure his readers positively that "he appears late at night," although the police report while stating that people do hang around awaiting his appearance, does not venture to affirm that, as a matter of fact, he ever did appear. Then the timid people avoid the house; and certain valiant souls have "made a stand against ghosts in general"—both of which pieces of information owe their origin to the fertile imagination of the reporter.

This serves as a sample of the way "news" is concocted. It is immaterial whether it be true or false; a small modicum of truth, with a copious embellishment of lies, is all that seems to be required. Perhaps, on the whole, it may be considered rather "good business" that the lie element should predominate, as that will afford occasion for a second item correcting the first.

But to proceed: The owner of the house thus villified brought an action against the publishers of the newspaper to recover damages for libel of her property, but the Judge who tried the action dismissed it as being without precedent, and also because a similar libel was published in another newspaper, and the damages were thought to be largely imaginary, and it would be impossible to estimate which of the articles caused the damage, if any.

It does not appear to us that this is a satisfactory conclusion. It is quite possible to believe that very serious and permanent damage might accrue to a house-owner by the spreading abroad a statement that his house was haunted by a ghost. It may be a very foolish thing, but, none the less, there are many people who do believe in the appearance of ghosts, and who would not, on any consideration, be induced to rent a house having the reputation of being haunted. If it is not an actionable slander to say that a man's house is the resort of prostitutes, or that his house is infested with bugs, or contaminated by fever, though he is able to shew special damage as the result of such reports, then we have no hesitation in saying the law is defective in a material particular. On what ground it can be maintained that a man may go about, with impunity, spreading reports to the prejudice of another man's property, we fail to see. We are inclined to think that the conclusion that such slanders of property are not actionable, is not well founded. But, it may be said, allegations of alleged defects of the kind we have mentioned are within human experience, but that to charge that a house is haunted by a ghost is to allege something beyond human experience. It is to allege the existence of something that does not exist as a fact, but merely in the imagination of credulous people. No doubt there is some force in that contention; at the same time it is undoubtedly the fact that people who do believe in the appearance of ghosts form a considerable part of the community, and are liable to be affected by such reports. The supposed appearance of ghosts, we all know, is often found to be susceptible of a very simple explanation. Some of our readers may remember that some thirty or forty years ago people congregated in crowds night after night in Bond street, in the city of Toronto, to see a supposed ghost, which was believed to haunt the neighbourhood; and the curious character of this ghost was that it seemed to float about in some large willow trees in a most unaccountable manner. But when we come to consider the material of which ghosts may be supposed to be made, if we

may apply the language of mundane things to such an illusory and supra-mundane phenomenon, then we would imagine that they would very naturally float about in the air and do things which ordinary terrestial bodies are incapable of doing. Whether this particular ghost was destitute of raiment we are unable to affirm; any legitimate ghost, one would think, must necessarily be so, for it is hard to believe in the existence of the ghosts of clothes as well as of human beings, and in the land of ghosts one might reasonably conclude that sartorial facilities would necessarily be very limited. However, be that as it may, the ghost we refer to was actually seen many times, and its appearance and disappearance anxiously watched, until it was at length discovered that some ingenious youth in a near-by house, with the aid of a light and a piece of glass, or a lantern, was "calling up the spirits from the vasty deep," whereupon the excitement subsided and some people possibly felt foolish.

By a curious coincidence, it would appear that there is now pending in England an action of precisely the same character. In that case, in 1903, Stephen Phillips, the distinguished poet and dramatist, rented a country house. Hardly was he settled when mysterious noises were heard. The poet's young daughter saw, or at all events thought she saw, an uncanny little man creeping about the house, and when the poet himself was seated writing in his study, the door sometimes unaccountably opened itself. The servants would not stay in the house, and the poet had also to give it up. Since his departure it has remained untenanted, and the owner is now claiming damages against the publishers of the newspapers which made the story public. It will be interesting to learn how the English Courts will view the plaintiff's case.

Later advices shew that the plaintiff recovered a verdict for £90.

In the Manitoba case the Court of Appeal (after the above was in print) set aside the judgment at the trial

and gave judgment for the plaintiff for $1,200; so that the Manitoba plaintiff has fared even better than the English one. We notice that Perdue, J.A., dissents from the judgment of the majority of the Court (Richards and Phippen, JJ.A.). But, after perusing the dissenting judgment, we find that it is to some extent based on a difference of opinion as to the proper conclusion to be drawn from the evidence on matters of fact.

FORMATION OF CONTRACT IN ENGLISH LAW.

From the German by Ernst Schuster; translated by F W. Wegenast, Osgoode Hall.

In the later editions of his "Principles of Contract," Sir Frederick Pollock calls attention to two articles, "Der Vertragsschluss naeh Englischem Recht," and "Die Consideration als Gültigkeitsbedingung des Vertrags in Englischem Recht," by Ernst Schuster, published in a German law periodical of Berlin.

A translation of the former of these articles is here offered in the hope that it will be found interesting as a sort of birdseye view of English contract law from the standpoint of a foreigner, as well as affording a remarkably clear and concise exposition of the leading principles of our contract law. F. W. W.

The doctrine of contracts (a) according to English law has not yet, so far as the writer of these pages is aware, been dealt with in Germany. Nevertheless, it is far more adapted for comparative treatment than other related topics. In the first place, it deals more exclusively with the development of universal legal conceptions than with the influence of historical and local circumstances, as in the case of the Law of Things. In the second place, such a discussion is of great practical value because, where the German Courts are obliged to decide according to English law, it is just such questions of contract law that will most frequently occur. In the third

(a) One of the difficulties in the way of an accurate translation the principles of English contract law into German, and, *e converso*, of German contract law into English, is the want of a synonym for "contract" in German, and for "Vertrag" in English. The terms may be loosely used as interchangeable, but, as is here pointed out, they are not synonymous. F. W. W.

place, the consideration of the English law renders more practicable the discussion of the doctrine of contract from the casuistic standpoint, since, in consequence of the importance of practice in English law, the collections of the decisions are particularly valuable; and also because the material derived therefrom has, in digests and textbooks, been far better arranged and worked up than is the case in other countries.

The doctrine of contracts has, as Anson says, "fortunately," remained, at least in its foundations, entirely free from the interference of legislation.

The decisions of the English Courts are therefore to be regarded as the principal sources of the law. With regard to these decisions the rule holds goods that the decisions of a superior court of appeal are absolutely binding. Even the decisions of the House of Lords cannot be overruled by the House of Lords, and can be suspended only by way of legislation.

In the following pages the decisions are cited in the manner customary in England. Where these are contained in the collection by Langdell, the page on which they are to be found is also given. The following works are cited merely by the name of the author.

Pollock, "Principles of Contract," 3rd ed., 1881; Anson, "Principles of the English Law of Contract," 2nd ed., 1882; Leake, "Digest of the Law of Contracts," 1878; Benjamin, "Sale of Personal Property," 3rd ed,. by Pearson & Boyd, 1883; Langdell, "Selection of Cases on the Law of Contracts;" Addison, "Contracts," 8th ed., edited by H. Smith, 1883; Windscheid, "Pandekten," 5th ed., 1882; Stobbe, "Deutches Privatrecht," 2nd ed., 1882; Thöl, "Handelsrecht," 6th ed., 1879; Schlossmann, "Der Vertrag," 1876; Bähr, "Die Anerkennung," 2nd ed., 1867; Leonhard, "Der Irrthum bei nichtigen Verträgen," 1 Band, 1882; Zitelman, "Irrthum und Rechtsgeschäft," 1879.

CLASSIFICATION OF CONTRACTS.

English law distinguishes, according to the usual classification, three varieties of "Contracts."

1. "Contracts of Record."

2. "Contracts under Seal (specialty contracts.)"

3. "Simple Contracts (parol contracts.)"

The expression "Contracts of Record" is applied to the rights arising out of a judgment of a court or out of certain declarations enrolled on the records of a court;[1] and includes a class of sources of obligation which do not come within the scope of our discussion. The two latter classes include all "contracts" in the strict sense of the word.

The idea of "contract" answers, on the whole, to that of obligational (b) agreement. It is wider than this idea, for even a one-sided unaccepted promise can, under certain circumstances, be a "contract;" it is narrower, for an agreement which does not produce an enforceable right is not a contract. One speaks of a "void agreement" but not of a "void contract." (c)

A "contract" arises only when the agreement or promise involved is authenticated in a prescribed form, or when, for a completed or a promised act, a positive or negative *contra-act* is promised or performed. From this results the division into "contracts under seal" and "simple contracts."

[1] Cf. Leake, 155 et seq.; Anson, 46; Anson (p. 7) speaks of the designation as an unfortunate one.

(b) The term "obligational agreement," here, with some hesitation, introduced, is merely an Anglicised form of the term employed by the author. The term is extensively employed by Savigny (System, § 141) when he distinguishes "obligatorischer Vertrag" (i.e., agreement resulting in obligation), from the generic term of "Vertrag," which includes not only agreements which in their nature are incapable of having any legal effect, but also such agreements as conveyances, bargains and sales, etc., where no obligations are left outstanding on either side. F. W. W.

(c) In this case error has triumphed, and the ambiguous term "void contract" has become sanctioned by general use. F. W. W.

"Contracts under seal (contracts by deed, specialty contracts)" may be formulated in a written instrument provided with the seal of the party charged, and, as a rule, must be delivered to the party to be benefited or to a third person for him. The delivery in the meantime is deemed to be complete if the promisor simply declares that it is to be regarded as complete, without the surrender of the instrument out of his custody (just as in Roman law the *constitutum possessorium* was regarded as tradition.[2] "The promisor may, in such delivery, stipulate that it shall be ineffective until the arrival of a certain time or till the fulfilment of a condition, but, when the period has elapsed or the condition has been fulfilled, the delivery is complete, and the promisor is completely bound, whether he still has the instrument in his custody or not."[3] The technical term for such an instrument, so long as the condition is pending, is an "escrow."

"Simple contracts (parol contracts)" must comply with the requirement of "consideration." A promise that is not given by deed under seal is binding only when the party entitled (promisee) has given or promised to the party under obligation (promisor) by way of contra-performance some advantage, or has himself suffered, or promised to suffer, some disadvantage.[4] A further analysis of the idea of "consideration" would here lead too far.[5]

It follows from the requirement of "consideration" that the will of the promisor alone cannot establish a contract; it is otherwise in the case of "contracts by deed." It is de-

[2] Doe d. Garnons v. Knight, 5 B. & C. 671; Xenos v. Wickham, L. R. 2 H. L. 296.

[3] Xenos v. Wickham, at p. 323.

[4] Cf. Currie v. Misa, L. R. 10 Ex. at p. 162, and the passage there quoted from Comyn's Digest, "Action on the Case," "Assumpsit B.," 1-15; Pollock, 179; Leake, 17; Anson, 69.

[5] Ruttiman, Der Englische Civilprozesz (p. 26), translates "consideration" as "Motiv;" this is decidedly incorrect. In the judgment in Thomas v. Thomas (2 Q. B. 851, Langdell, 164), express warning is given against the interchange of consideration and motive. On the distinction between "consideration" and *causa*, cf. Pollock, 179.

finitely settled that the promise of a party, when formulated in a sealed deed, may be binding without being accepted by the opposite party. So in Hall v. Palmer,[6] a bond was held valid which the maker had executed in favour of a former concubine and had given to his attorney for safe-keeping, and of which she knew nothing until his death. In Fletcher v. Fletcher,[7] a claim of an illegitimate son upon the estate of his father was recognized on the ground of a sealed deed which had remained in the custody of the latter and was only found after his death.

The decision of the House of Lords in Xenos v. Wickham[8] set all doubts on this point at rest.[9] When therefore Schlossmann[10] says that "a proposition . . . that under certain circumstances an unaccepted promise might create an obligation" would be "a juristic monstrosity," it may be reiterated that this proposition is, nevertheless, in countries where English law is administered, a principle of positive law.

The obligation created by a deed under seal loses its force if the party entitled expressly refuses the offer thereby made.

"Contracts under seal" are distinguishable from "simple contracts" in their operation as well as in their form and in the requirements of their formation,[11] but the point cannot be further discussed here.

[6] 13 L. J. N. S. 352.

[7] 14 L. J. N. S. 352.

[8] L. R. 2 H. L. 296.

[9] Anson thinks the contract is not perfect before the acceptance has been made; but that the offer contained in the deed is not revocable (p. 29); the theory of the prevailing opinion seems more natural.

[10] P. 10.

[11] Leake, 146; Pollock, 47; Anson, 28.

2. Simple Contracts.

A. *Theory of Consensus.*

In the case of "contracts by deed" the form has a double operation. It takes the place of the source of obligation and is at the same time the requisite for the validity of the obligation.[12] In the case of "simple contracts" two elements take the place of form: the consensus as source of the right and "consideration" as the requisite for its validity.[13]

The conception of consensus we shall endeavour to ascertain as we next inquire whether one of the theories set up on this point in Germany is applicable to English law, and only afterwards undertake a positive construction. We must therefore examine both of the following theories from the standpoint of the English law.

1. Consensus is the actual concurrence of the wills of the contracting parties, which concurrence finds its expression in the declarations out of which the agreement arises. When it is established that that which is expressed as willed in the declaration is not actually willed, then the declaration does not produce the legal result which is expressed as being willed.[14]

2. "The consensus duorum in idem is a concurrence of reciprocal and interdependent acts of expression according to their meaning." "The meaning of an expression is that thought which the person to whom the expression is addressed must gather from it."[14a]

[12] On this double function of form in the Roman formal contract, cf. Bähr, p. 29. He distinguishes between the negative formal element (the form as source of the right) and the positive formal element (form as requisite for validity).

[13] There may, in particular cases, be in addition formal requirements to comply with as conditions of validity.

[14] Windscheid, § 75, note 1a.

[14a] Leonhard, 71 and 76.

That the former notion does not correspond to the view of the English law is easily demonstrated. (c[1]) The meaninglessness of the inner will with regard to legal consequences has been recognized from early times. In a case in the time of Edward IV.[15] the attorney of the plaintiff says, without any objection being raised, "the intention of a man is uncertain, and in an action only that which is known or may be known to the jury should be brought out."

In the same time, says Chief Justice Brian, in a much-cited decision,[16] "it is trite learning that the thought of man is not triable; for the devil himself knows not the thought of man."

More direct application to our subject have the following passages:—

In Pickard v. Sears (6 A. & E. 474), it is said, "if one wilfully makes another believe that a certain state of things exists, and induces him to act accordingly, the former cannot aver against the latter that at the time in question the state of things was otherwise." That is, therefore, where one by his words or conduct induces another to believe that the will declared in his expression is his will, and to act upon this belief, he cannot afterwards set up that the will so expressed was not actually his will.

The word "wilfully" might possibly give rise to the idea that it was a question of the intentional utterance of a false pretence, which should be imputed against the author and thus should create an obligation on the ground of his offence.[17] This interpretation is, however, expressly obviated in the judgment in Freeman v. Cooke, 2 Ex. 654. In this

[15] Year Books, 4 Edw. IV., 8. 9. cited by Digby, History of the Law of Real Property, at p. 262.

[16] Year Book, 17 Edw. IV., cited by Blackburn on Sales, p. 190, and by the same as Judge in Brogden v. Metropolitan Railway Co.

[17] On this point cf. Zitelmann, Irrthum und Rechtsgeschäft, p. 264.

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c[1] This theory was originally propounded by Holland and adopted by Leonhard. See Holland's "Jurisprudence," 8th ed., p. 230.

case, after reference to the case of Pickard v. Sears, the expression "wilfully" is defined to indicate that it must be the intention of the author of the expression to bring about an act on the part of the other person, and that the act so done must be in consequence of such expression; and it is further said, "if, whatever a man's real intention may be, he so conducts himself that a reasonable man[18] would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

In Smith v. Hughes, L. R. 6 Q. B. 607, Blackburn, J., says: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."[19]

Very clearly says Leake (p. 12): "The law judges of the state of mind or intention of a person by outward expressions only, and thus excludes all questions concerning intentions unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words and actions."

These evidences will suffice to shew that the first of the above mentioned theories is not tenable with regard to English law, but it will not have escaped the reader that its content is also incompatible with the second theory. For we have seen that the author of an expression is, of course, bound by the objective sense of his expressions, without regard to his intention as to its meaning—nevertheless, only when such representation was made for the purpose of inducing the

[18] The word "reasonable" has, in legal usage, a technical meaning which cannot be reproduced in German.

[19] Similar expressions by Regelsberger and Bähr are cited by Schlossmann, pp. 125 and 126.

other to do an act and the other performs the act by way of taking up this intention. There are, therefore, to be taken into consideration, besides the meaning of the expression, two other elements: first, the intention that the expression is to lead to an act on the other side; second, the acceptance or taking up of the act with knowledge of such intention.[20]

Indeed, in the rule in this instance, comes again into operation the principle that the thought of man cannot be taken into consideration in an action, and in this respect also recourse must be had to the judgment of a reasonable man.

The concurrence which Leonhard demands between the expressions, namely, that they must be given with same object in view, and that at least the first must come to the knowledge of the person to whom it is addressed, is entirely different from the concurrence here spoken of. The requirement of a mutual aim does not, as we shall shew below, exist in English law.

It is here to be observed that in many cases the meaning of an expression apparent to the addressee is not sufficient to ascertain whether it is a declaration creating a "consensus." In the case of expressions which are uttered in words, there cannot easily be a doubt; not so with acts. Take, for example, the following instance: A. writes to B.: I am prepared to accept from you 100 zentners of coffee at 50 marks. B. agrees to the proposition and ships the coffee. In English law this is a sufficient declaration of the acceptance of the offer which A. has made to B. Suppose, however, that B. does not accede to the offer and makes a counter-offer as follows: he ships the coffee and at the same time writes to A. that he cannot accept the proposal, but that he is sending the coffee in the hope that A. can pay 52 marks per zentner, otherwise he may deliver the coffee to C. Here the sending of the coffee is not an acceptance, nor does it

[20] "With knowledge of" is here not synonymous with "induced by." This would not be consistent with the decision in Williams v. Carwardine, to be more closely examined below.

become an acceptance by the loss of B.'s letter in the post. The meaning of the sending of the coffee apparent to A. is in both cases the same.

A further consideration of the derivation of consensus from the meaning of the declaration (d) reveals that in many instances a consensus is assumed and is operative where only one, or even no, declaration is made. "Contracts" which result from such a consensus are called "implied contracts," or "contracts implied in law." Since, however, this expression is also employed in a wider sense, a certain amount of care is necessary in using it, and it will therefore be expedient first to mention the classes of contracts not belonging here, which, in the wider sense, are also "implied contracts."[21]

1. Contracts which in German idiom would be said to have originated from a tacit declaration.

2. Contracts supplemented by law either because the agreement is incomplete or because the force of the contract is either partly or wholly independent of the judgment of the parties. This supplementation takes place (a) by reason of the existent declaration, (b) by reason of custom, (c) by reason of a legal decision.

When the difference pointed out by Leonhard (§ 3 and § 7) between the lex contractus and acquiescence under it, is taken into consideration, no argument can be deduced from these examples against his theory.

"Contracts implied in law," in the narrower sense, on the other hand, are created by acts or circumstances which are by rule of law deemed to operate as acts of acceptance: they are by many authors distinguished from real contracts

[21] Addison divides "implied contracts" into "inferred contracts," "constructive contracts," and implied contracts," in the narrower sense.

(d) Where the word "declaration" (Erklärung) is here employed an English writer would have said "promise." A clumsier, but more precise translation of Erklärung, would be "expression of intention."

by calling special attention to their analogy to the Roman quasi contracts.[22] They are also defined as contracts which do not arise out of agreement, i.e., out of proposal and acceptance.[23]

These were enforceable, under the old formulary procedure, as "simple contracts" by means of the "action of assumpsit;" in which case the expressions of intention were supplied by a fictitious proposal and acceptance. The "action of assumpsit" was far more favourable to the plaintiff than the "action of debt," which might also have been employed, and it may therefore be supposed that the designation of these relations as "contracts," and the fiction of the proposal and acceptance, was merely a make-shift to secure to any one who might have a claim on the ground of such a set of circumstances, greater facility in enforcing his right.

According to the formula which was employed for them in an action, the claims to which they give rise fall into the following classes:—

1. Claims for money which one person has paid for the use of another. Such a claim arises only when one person has been obliged to pay something which another person, by rule of law, was bound to pay; so, for example, when the surety has been obliged to pay for the primary debtor or the sub-tenant for the tenant.[24] The claim is not applicable in the case of a voluntary transaction.[25]

2. Claims for money which one person has received for the use of another. These are claims on the ground of unjust enrichment, and here belong the cases in which in the civil law *condictio ob injustam causam, condictio indebiti, condictio causa data causa non secuta,*[26] were applicable.

[22] Pollock, 9; Anson, 355.

[23] By Leake.

[24] Analogous cases are summarized by Leake, 77 et seq., and in the notes to Lampleigh v. Brathwaite, 1 Sm. L. C. at p. 164 et seq.

[25] See summary by Leake, p. 87 et seq.

[26] Anson thinks that the latter case belongs to the contracts depending on agreement: p. 359, note 1.

3. Claims on an acknowledgment of a barred debt. The acknowledgment must be made to the creditor.[27]

In this place are also frequently mentioned the obligations arising from the judgments of a foreign Court. That they do not properly belong here is proven by the circumstance that the action peculiar to "simple contracts," viz., the "action of assumpsit," was not employed here, but the "action of debt."[28]

Besides the "contracts implied in law," there is a series of "contracts" which are not classed with contracts in the text books, but which, according to their legal meaning, belong to them. These are cases where, indeed, a seeming declaration appears which nevertheless is no real declaration, and which, as a rule, has no force. Thus the promise of a juristic person (e) is binding only when contained in a deed under seal. In exceptional cases such a juristic person may bind itself in other ways, i.e., in cases where convenience, amounting almost to a necessity,[29] demand it. In other words, by means of the seal alone does a declaration become the declaration of a corporation; in some cases, however, no inquiry is made whether the declaration is authentic or not; rule of law takes the place of declaration of intention.[30] Another case, which undeniably falls under this head, is that of the lunatic or irresponsible drunken person. A declaration made by a person in such a state cannot be taken up by

[27] Leake, 118.

[28] On legal nature of an obligation arising out of a foreign judgment, cf. Piggott, Foreign Judgments, I. 3.

[29] Church v. Imperial Gas Co,. 6 A. & E. 861.

[30] In the case of juristic persons which carry on trade, the law declares as a fixed rule that the expression of intention of the lawful representative is to be regarded as the expression of intention of the juristic person, when they are given in exercise of the proper functions of such juristic person. The exception in this case, however, comes under a different principle.

(e) This is the German expression for what we call in general a "corporation."

anybody as an expression of intention. Nevertheless "contracts" in which such persons are parties are as a rule only voidable, not void, and in certain cases absolutely valid. The contracts of minors are void with the exception of those for the supply of necessaries. In all these cases it cannot be said that the persons under disability are in exceptional instances capable, or that the unreal expression of intention becomes, in exceptional cases, a real one. The will is here demanded by the law, and it is not a question, therefore, of capacity to contract or of the existence of a real expression of will.

It is difficult to see why such "contracts" should, as is universally the case, be regarded as genuine contracts, when those mentioned before belong to a different branch of law. In fact there are to be found numerous instances in the decisions in which these agreements without expressions of the will and those in which there is an unreal expression of the will are dealt with in a manner quite analogous; besides, between both these classes and those which include "implied contracts" only in the wider sense of the word, there is no line of demarcation drawn.

Chief Justice Tindal says, in Hoadly v. McLaine, 10 Bing. at p. 487, where the matter in question is a contract of sale where the parties had not fixed a price, i.e., a contract completed by the law: "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to the price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."

In Morgan v. Ravey, 6 H. & N. at p. 276, the question of the responsibility of an innkeeper for the goods of his guests is dealt with. In the judgment it is said: "We think the cases have established that where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him."

In Gore v. Gibson, 13 M. & W. 625, the contract of a drunken person is declared, on the ground of peculiar circumstances, to be valid. Chief Baron Pollock says in his judgment: "Where the right of action is founded upon a specific distinct contract requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law makes the contract for the parties."

The obligations which arise out of "contracts implied in law" were, indeed, in Roman law also regarded partly as obligations quasi ex contractu, but there are not wanting even in German jurisprudence attempts to bring these nearer to the obligations arising from real agreements.[31] On the other hand, the reader will not have forgotten that the claim arising from a settled account figures here, while in Germany such a claim, when acknowledged in the manner required by the English law, is to-day generally regarded as arising out of a real agreement.[32].

Modern German legislation also recognizes a contract in which, on the one side, the declaration is supplied by the action of the law. Every other interpretation of article 323 (first clause) of the German Commercial Code, is unnatural. A merchant who, on his return to his place of business, after recovering from an illness, finds that by his silence he has accepted a proposal the carrying out of which involves him in risk, or which, if not carried out promptly, subjects him to payment of damages, will scarcely admit, when his lawyer tells him, that his silence was a tacit or possibly an express[33] declaration. But he cannot raise any objection if he is told that the law prescribes for him,

[31] Brinz, Pandekten, 2nd ed., § 249, p. 147. The similarity between these "contracts" and the Roman "real contracts" has also not remained unnoticed by English jurists. Cf. Anson, 354.

[32] Windscheid, 412a, note 1; Bähr, § 44.

[33] See Zitelmann, 262, note 227.

as a merchant, certain rules of conduct, and construes a declaration in cases where, according to such rules, he should have declared himself. It must not, of course, be understood that simple silence is not, in certain circumstances, to be regarded as a declaration of intention.

The result of our examination may be summarized as follows:—

1. When once it is established that a declaration is to be regarded as an element of a consensus which is intended to give rise to an agreement, then the meaning of such declaration, so far as its legal effect is concerned, is determined with reference to the interpretation which "a reasonable man" would put upon it.

2. In order to decide whether a declaration is to be regarded as an element of consensus, it must be determined whether the author has made it with that intention, and whether the assenting declaration of the person to whom it is addressed has followed with knowledge of such intention. This determination follows the opinion of a "reasonable man" according to objectively definable characteristics, which need not, however, be incorporated in the declaration itself.

3. A consensus may also be inferred where no declarations have been made from which they may be inferred. In other words, the consent is determined by outward indications. Where there is an expressed declaration, this may be one of the indications. It frequently requires other indications, however, to establish the causal relation between the declarations. Where there is no declaration, one must needs judge by the other indications.

The word *consensus* is here employed in the sense in which English writers employ the word "consent," for only in this sense can it be applied, if the assertion, made at the beginning of this section, that consensus is the binding element of "simple contracts," is to be maintained. In the numerous instances in the decisions where the *consensus*

in idem is spoken of, the expression is likewise employed in the same way.

Consensus, in this sense, is the known and outwardly knowable agreement of the wills of the parties. Will is something internal, not capable of being directly apprehended. The psychologist, therefore, as well as the jurist, must, in order to ascertain it, judge by external indications.

They must, however, since they pursue a different object, apply a different method. To the psychologist the individual is the important factor; the jurist regards the individual only in the light of his connection with the whole. The psychologist is concerned more with the motive, the jurist—at least in civil law—more with the effect of the will. To the psychologist the determination of the will is itself an end; to the jurist it is merely a means to the attainment of another end. The will is indeed, in law, to be taken into account, but only in so far as it is in accordance with the other aims of the law, and therefore only in so far as it is the will of an *aequus et bonus*. Where, therefore, the law seeks to ascertain the human will, it proceeds on the assumption that the party is *aequus et bonus*. If he is not so, then the interpretation is, as a matter of fact, incorrect; but it does not, in that event, at all matter that it is incorrect. Proceeding from this standpoint, we may define will, as regarded by the law, as the intention which a person, judged by his words, acts, or other circumstances relating to him, *should* have, i.e., the intention which the law demands of him in order that he may not put himself in opposition to the other aims of the law. The aims of the law cannot be defined in general terms; they vary, partly at least, according to time and place. The intention postulated by the law is that intention which is demanded by the particular system of law under consideration.

English law gathers such an intention—

1. From words and acts. It presumes that a person should have such an intention as a reasonable man would gather from such words and acts.

2. Partly from words and acts, and partly from other circumstances. The circumstances may be connected with the person of the party speaking or acting, or with the transaction in question, or with both together. When a deed of conveyance, or a lease, or a mortgage, is executed, the law demands certain intentions from the contracting parties, which need not be expressed. Similarly, it requires certain intentions in the contracts of railway companies, carriers, bankers, etc.[34] (f)

3. From circumstances which ought to influence the will of the person in question. In this respect the law must not go too far, so as not to become vague or uncertain. It would lead us too far afield to inquire further just why, in the instances cited above, when there is an unreal declaration or no declaration at all, the unexpressed intention is nevertheless demanded by the law; why, for instance, the *negotiorum gestor* according to English law has no *actio contraria*, while other obligations which, according to the Roman law, exist *ex aequo et bono*, are valid also in English law. In general, it may be said with Brinz, with regard to the English law, that in all these cases it is not at all necessary, on account of the existent *aequitas*, to resort to the theory of a *conventio*. There presents itself in all these cases an unjust extension of capacity on the one side, and an unjust diminution of capacity on the other side, and it would be dishonest not to endeavour to equalize the disproportion.

(*To be Continued.*)

[34] The special treatment of commercial transactions which the German commercial law prescribes is non-existent in English law.(f).

(f) German commercial law is codified as is our criminal law, and to ascertain the law on any particular point on commercial law the German lawyer resorts to his "Handelsgesetzbuch." F. W. W.

RECENT CASES FROM THE TIMES LAW REPORTS.*

Bill of Lading.]—The decision of Channell, J., in Thorley v. Orchis Steamship Co., 23 T. L. R. 89, that deviation of a ship from its voyage deprives the ship-owners of the benefit of a provision in the bill of lading exempting them from liability for negligence, even where the resulting damage is in no way referable to the deviation, has been affirmed by the judgment of the Court of Appeal, 23 T. L. R. 338, which states the ground of the decision to be that the ship-owners had voluntarily substituted another voyage for that in respect of which the contract had been made.

Carriers.]—To the same effect as St. Mary's Creamery Co. v. Grand Trunk R. W. Co., 8 O. L. R. 1, is the case of James Nelson and Sons v. Nelson Line (Liverpool), 23 T. L. R. 302, in which it is held by the Court of Appeal that a condition in a charterparty providing that the ship-owners were not to be liable for any damage to goods "which is capable of being covered by insurance or which has been wholly or in part paid for by insurance," is not sufficient to exempt the ship-owners from liability for failure to take reasonable care.——In Smitton v. Orient Co., 23 T. L. R. 359, the plaintiff sued for the value of a watch and other valuables which, while a passenger on the defendants' vessel, he had placed for the night in a receptacle provided for the purpose in his cabin. This receptacle was so placed that it could be reached through a fanlight leading into a ventilating shaft, and some one getting access to this shaft and reaching through the fanlight, stole the valuables. The plaintiff charged negligence on the part of the company in placing the receptacle where it was, and alternatively a breach of an

* Including cases in the number for the week ending 12th March, 1907.

implied warranty that the cabin was safe. Held, as to the charge of negligence, that this was answered by a condition printed on the plaintiff's ticket, and forming a valid contract, exempting the defendants from liability in case of theft by any person, or negligence of the defendants' servants. Held, as to the claim for breach of warranty, that there was an implied warranty, arising out of the general liability of a carrier by sea, that the vessel was fit for the purpose of carrying the goods in question. The liability as to goods ordinarily carried about the person was the same as in respect of the passenger himself; as to these the carrier was not an insurer. The carrier's liability as to these was not increased when they were laid aside for the night, but, even if it were so, the defendants were protected by s. 502 of the Merchants Shipping Act against liability for loss of such valuables happening without their "actual fault or privity." This "actual fault," to make the defendants liable, must be that of the management, not, of a subordinate, such as the marine superintendent who placed the receptacle.

Cheque for Gaming Debt.]—In Moulis v. Owen, 23 T. L. R. 348, the plaintiff sought to recover £461 on a cheque given by the defendant in exchange for 11,000 francs borrowed in Algiers from the plaintiff for the purpose of paying the defendant's gaming losses, and to enable him to continue play at a private club there. The cheque was drawn on a bank in London. The trial Judge, Darling, J., held that the anti-gaming Acts, 9 Anne c. 14 and 5 & 6 Wm. IV. c. 41, struck at gaming in England and not in a foreign country; that, therefore, the cheque was not void, and the plaintiff was entitled to recover. The Court of Appeal held, however, Fletcher Moulton, L.J., dissenting, that, as the action was on a cheque payable in England, the Acts cited were a complete defence to the whole claim, notwithstanding that the transaction in respect of which the cheque was given was presumably valid in Algiers. Fletcher Moulton, L.J., dissenting, conceded that the law of the place

of payment must govern, but held, with the trial Judge, that the Gaming Acts were intended to apply to gaming within the realm only, and that the plaintiff was entitled to succeed either on the cheque or on a claim for the debt for which the cheque was given.

Common Employment.]—Where a pauper was compelled by Poor Law Guardians to do certain work at the workhouse infirmary, and in the course of it was injured by reason of defective construction of a scaffold erected by a servant of the Guardians, it was held by the Court of Appeal that, as the pauper was compelled to do the work, the doctrine of common employment did not apply, but held, on the other hand, that the Guardians in putting the pauper to work were acting only in discharge of their statutory administrative duties, and they were therefore not liable for the negligence of their servant: Tozeland v. West Ham Guardians, 23 T. L. R. 325, reversing the decision of a Divisional Court, 22 T. L. R. 300.

Master and Servant.]—In Storey v. Fulham Steel Works Co., 23 T. L. R. 306, the defendants in August, 1903, agreed to employ the plaintiff for five years as their works manager. The agreement contained no provision enabling the defendants to terminate it. Towards the end of 1905 the plaintiff became ill and was absent from work from time to time. In January, 1906, he was examined by a physician, and was ordered to take a complete rest, with special treatment. It did not appear from the doctor's certificate that the plaintiff would never be able to resume his work. In April, 1906, the plaintiff continuing absent by reason of his ill-health, the defendants gave notice terminating the agreement, and appointed one of their staff as manager. By the middle of May the plaintiff recovered and was fit for work. In an action for damages for breach of contract Mr. Justice Channell held the plaintiff entitled to recover, basing his judgment upon the ground that the defendants could not have thought, when they rescinded the agreement, that the plaintiff would not be able to perform a

substantial part of his agreement, which had still two years and four months to run.

Sale of Goods by Auction.]—McManus v. Fortescue, 23 T. L. R. 292, is an interesting case, dealing with the sale of goods by auction. Conditions of sale provided that goods would be offered subject to a reserve price, the highest bidder to be the purchaser, and one lot was knocked down to the plaintiff, who had bid less than the reserve price. The auctioneer, on discovering that the reserve price had not been reached, refused to sign a memorandum of sale to complete the contract. The action was brought against the auctioneer for breach of duty in refusing to sign the memorandum. The Court of Appeal, in holding the plaintiff not entitled to succeed, point out that it was not enough to shew that the auctioneer was the agent of the purchaser to write the purchaser's name in the memorandum, but he must shew that the auctioneer was under a duty to sign the name of the vendor, which he had failed to do. In their view each bid was a conditional offer, subject to the reserve price, and upon the fall of the hammer there was or was not a binding contract according as the offer was above or below the reserve price.

Service out of Jurisdiction.]—In a libel action by plaintiffs in England against newspaper publishers in Scotland. the plaintiffs claimed an injunction to restrain the defendants from circulating the libel in England, and applied for leave to issue a writ of summons for service out of the jurisdiction, urging that this claim for injunction gave them the right to such an order under the English Rule (Order 11, Rule 1). The defendants opposed the application on the ground that the claim for an injunction was not made bona fide, but merely for the purpose of bringing the case within the Rule. Taking into consideration the unlikelihood of the libel being repeated, and the fact, among others, that there is no reported case of an injunction having been granted in a libel action against the publisher of a newspaper, the Court of Appeal held that it was a case in which the dis-

cretion of the Court should be exercised against allowing service out of the jurisdiction: Watson v. Daily Record, 23 T. L. R. 333.

Ship.]—The judgment of the Supreme Court of Canada upon the cross-suit between the Allan Line steamship "Parisian" and the German steamship "Albano," in respect of their collision at Halifax, N. S., in March, 1905, has been reversed by the Privy Council. The Supreme Court, affirming the Local Judge in Admiralty, held that the "Albano" was alone to blame. The Privy Council holds that it was the duty of the "Parisian" under art. 19 of the Canadian regulations to keep out of the way of the "Albano," and that the "Parisian" was wholly to blame: The "Albano" v. The "Parisian," 23 T. L. R. 344.

Thellusson Act.]—In In re Cattell, 23 T. L. R. 331, it is held, for the first time in England, that a trust in a will for accumulation during the minority of a person not born or en ventre sa mère at the death of the testator, but who, if born, and of full age, would be entitled to the income to be accumulated, is valid. Neville, J., in giving judgment, referred to and dissented from dicta in previous cases to the effect that the Thellusson Act prevents accumulation during the minority of an unborn child.

Way.]—Where a right of way was granted to the defendant, owner of a girls' school, "her tenants, visitors, and servants," to the end that it should be appurtenant to the defendant's premises "for all purposes connected with the use, occupation, and enjoyment of the premises," it was contended (Thornton v. Little, 23 T. L. R. 357), that this did not authorize user of the way by the defendant's pupils, who could not be called visitors. Kekewich, J., held that to restrict the word "visitors" in this manner would be to cut down the meaning of the subsequent phrase, shewing the intent of the grant to be for all purposes connected with use, occupation, and enjoyment. Held, therefore, that pupils had the right to use the way.

THE LATEST ONTARIO DECISIONS.*

Assessment and Taxes.]—A description of lands in an assessment roll in the words and figures,—"1242 x 300, 8 57-100 acres, east side Carlaw avenue," was held by MacMahon, J., in Russell v. City of Toronto, 9 O. W. R. 288, not to be a compliance with s. 13 of the Assessment Act, R. S. O. 1897 c. 224. To make a purchase by the municipal corporation valid, the lots to be purchased, it was decided, must be selected by the council, and notice in writing of the intention to purchase given to the owner. Also it was held with respect to the Act of 1902, validating all previous sales, that its general terms, being followed by expressions limiting the extent to which the validation should be applied, viz., to the irregularities in the assessments, failure to comply in regard to the manner in which any assessment roll or collector's roll has been prepared, or in regard to certifying or signing the same, etc., were to be cut down or restricted to matters ejusdem generis with the matters enumerated.

Company.]—The local Master at Ottawa in Re Ottawa Cement Block Co., 9 O. W. R. 305, placed one Macoun on the list of contributories. The latter had subscribed for shares in the company, whose secretary-treasurer he was, and on the 31st December, 1905, after a call had been made for the balance due on his stock, entered, in what served as the company's cash book, on the debit side,—"L. S. Macoun part payment on account of services to date $275," and on the credit side,—"L. S. Macoun 50 per cent. last call of 11 shares $275." The company's cheques were signed by the president after examination of the vouchers. The Master considered that the secretary-treasurer had no authority to make a set-off of one of these items against the other; but an appeal by Macoun was allowed by Mabee, J., 9 O. W. R.

*Short notes of the most important cases in volume IX. of the Ontario Weekly Reporter, Nos. 6, 7, 8, 9, pp. 273 to 416, inclusive.

409, on the ground that, there being no question of Macoun's good faith, there was a good payment in full of the moneys owing on the appellant's shares; that his claim for salary need not necessarily be regarded as a matter of set-off, but could be treated as a payment by him of the amount.

Constitutional Law.]—An appeal by the plaintiffs in International Text Book Co. v. Brown from the judgment of Falconbridge, C.J., 8 O. W. R. 835, noted ante 40, was dismissed by a Divisional Court: 9 O. W. R. 369.

Contract.]—In Kendrick v. Barkey, 9 O. W. R. 356, it was disclosed that John Barkey, deceased, had entered into an agreement with his son, the defendant, to convey a farm to the latter on condition that he would mortgage it, and pay his sister, the plaintiff, $1,000. Upon an action being brought by his sister to recover this sum, the question arose on what grounds, and by what form of action, the plaintiff could recover, if she could recover at all. Riddell, J., upon a review of the authorities, held that the administrators of the deceased had a right of action to enforce the contract, and allowed an amendment to add them as parties plaintiffs. It was also held that the facts established that the conveyance had the effect of making the defendant a trustee of these lands on behalf of the plaintiff, thus establishing a right of action in her, to which the Statute of Frauds was no defence, as it would in that event be used as the means of committing a fraud upon the plaintiff.

Damages.]—An appeal by the plaintiff in McCormack v. Toronto R. W. Co. from the judgment of Anglin, J., 8 O. W. R. 467, noted 26 C. L. T. 802, was dismissed by a Divisional Court: 9 O. W. R. 300.

Devolution of Estates Act.]—It is decided by Falconbridge, C.J., in Re Hart, 9 O. W. R. 285, that an administrator who is the only adult interested in the lands of the deceased, can register a caution without an order or certificate, as required by s. 14, s.-s. 5, of the Devolution of Estates Act.

Disqualification of Referee.]—An appeal by the defendant in Livingston v. Livingston from the judgment of Anglin, J., 7 O. W. R. 830, noted 26 C. L. T. 501, was dismissed by a Divisional Court: 9 O. W. R. 273.

Fraud and Misrepresentation.]—The defendant in Pitt v. Dickson, 9 O. W. R. 380, acting on behalf of one Beament, the president of a mining company, secured from the plaintiff, by fraud and misrepresentation, an agreement to sell certain shares in such company. This agreement he assigned to Beament. On discovery of the fraud, a settlement was arranged between the plaintiff and Beament, by which the latter was to have a portion only of such shares at the price stipulated, the plaintiff retaining the remainder, and there was thereupon a cancellation of the agreement by writing the word "cancelled" below the transfer of the shares on the back thereof, underneath which word the plaintiff and Beament signed. MacMahon, J., held that, apart from any reservation of the plaintiff's rights, there was no satisfaction for the tort committed by the defendant in procuring the fraudulent contract, and no relinquishment of the plaintiff's claim against him therefor.

Justice of the Peace.]—It is held by Anglin, J., in Rex v. Hodgins, 9 O. W. R. 298, affirmed by a Divisional Court, 9 O. W. R. 376, that a delay after an information had been laid for an offence under the Liquor License Act, from the 24th October to the 14th January following, did not oust the jurisdiction of a justice of the peace. It is pointed out that time might be required to consider or investigate a charge, as contemplated by s. 559 of the Criminal Code.

Landlord and Tenant.]—An appeal by the defendants in Cronkhite v. Imperial Bank of Canada from the judgment of Anglin, J., 8 O. W. R. 18, noted 26 C. L. T. 582, was allowed by a Divisional Court (9 O. W. R. 326), because the proviso in the later leases that the tenants might remove their fixtures, was not, in the opinion of the Court, restricted

to fixtures placed on the premises after the respective dates of such leases, and to articles that it had been agreed should be regarded as fixtures. This decision also casts some doubt upon the proposition that the right of a tenant to remove his fixtures is lost by his accepting a new lease of the premises, where the possession has been continuous.

Liquor License Act.]—In Re Frawley and Town of Orillia, 9 O. W. R. 365, Teetzel, J., decides that under s. 141, s.-s. 1, of the Liquor License Act, the council of a municipality may submit two separate by-laws, one for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and the other for prohibiting the sale thereof, except by wholesale, in shops and places other than houses of public entertainment, or one by-law limited to either class of premises.

Local Option By-law.]—An appeal by the applicant in Re Robinson and Village of Beamsville from the order of Mulock, C.J., 8 O. W. R. 689, noted ante 46, was dismissed by a Divisional Court: 9 O. W. R. 273, 317.——In Re Cleary and Township of Nepean, 9 O. W. R. 406, Mabee, J., held that uncounted or rejected ballots cannot be considered in ascertaining the number of electors voting on a local option by-law, in this respect affirming the view taken by Morgan, Co.C.J., in Re Weston Local Option By-law, 9 O. W. R. 250, noted ante 190. It was also held that it was open to an applicant to quash such a by-law to shew that illegal votes were cast.

Mechanics' Liens.]—An appeal by the plaintiff in Dunn v. McCallum from the order of the Master in Chambers, 9 O. W. R. 33, noted ante 112, was allowed by Falconbridge, C.J., because there had been "a substantial compliance with the Act:" 9 O. W. R. 315.

Mines and Minerals.]—The decision of a Divisional Court in Re Petrakos, 9 O. W. R. 367, is to the effect that

persons who have filed a claim upon the same property as the applicant, but subsequent to the filing of his claim, are "parties adversely interested," within the meaning of ss. 74 and 75 of the Mines Act, 1906, and entitled to notice of appeal, under such sections, from the ruling of the Mining Recorder.

Municipal Corporations.]—Upon an application to quash a by-law of the city of Ottawa, passed under the authority of s. 552 of the Municipal Act, s.-s. 2 et seq., as supplemented by s.-ss. 9, 10, and 11 of s. 25 of the Municipal Amendment Act of 1905, 5 Edw. VII. c. 22, s. 25, for providing a system for the collection and disposal of garbage, Falconbridge, C.J., decided that the method of removal and disposal by contractors of garbage collected at a place or places within the municipality was a "system" within the meaning of the Act; that it was no objection that under the arrangement the contractors removed the garbage to points outside of the municipality; that it did not constitute a defect that the by-law did not provide for the purchase or acquisition of land, plant, and buildings necessary and proper to establish and operate a garbage system, the provision as to this being only permissive; that a mode of operating the system partly by contract and partly by municipal operation was not unauthorized; and that certain provisions of the by-law were within the scope of the statute, although said to be in limitation of private rights and confiscating private property, calculated to prohibit trade and to interfere with contractual rights, and to create a monopoly, within the authority of Regina v. Johnston, 38 U. C. R. 549, and the Virgo Case, [1896] A. C. 88, because the restrictions laid down were "in the opinion of the public authority, necessary to prevent a nuisance:" Re Jones and City of Ottawa, 9 O. W. R. 323.——An appeal by the applicant in Re Campbell and City of Stratford from the order of Mabee, J., 9 O. W. R. 115, was dismissed by a Divisional Court (9 O. W. R. 345), and it was held that a municipal by-law providing that all eating houses in the city should be closed

between 1 a.m. and 6 a.m. every day, and on Sundays after 7 p.m., was intra vires and valid. The apparently conflicting decisions in Re Greystock and Municipality of Otonabee, 12 U. C. R. 456, and Re Barclay and Municipality of Darlington, ib. 86, were ingeniously reconciled by Riddell, J.

Municipal Elections.]—Because the declaration required by s. 178 of the Municipal Act had been made at a place other than the town hall, it was strenuously argued in Rex ex rel. Armour v. Peddie, 9 O. W. R. 393, that there had been no valid declaration and no completed election, and that, therefore, s. 204 could not apply. The Master in Chambers, however, ruled that this position was untenable, and cited instances where a literal compliance with s. 178 would be impossible.

Negligence.]—The plaintiff in Campbell v. Cluff, 9 O. W. R. 401, sued to recover damages for injuries sustained by him while passing along Bank street, in the city of Ottawa, in a street car, by the fall of a wall of the Gilmour hotel, left standing in Bank street after the burning of the hotel, 24 days after the fire. There was a city by-law under which the building inspector was empowered to require the owner in such a case to put the wall in a safe condition, and imposing a penalty in case of refusal, and authorizing the inspector, in case his demand was not complied with, to do the work himself. The wall was shewn to be dangerous, to the knowledge of both the city authorities and the owners, and MacMahon, J., held that the city corporation were liable to the plaintiff for negligence resulting in the injuries sued for, with a right to compensation from the owners.

Parliamentary Elections.]—The main point decided by the Court of Appeal in Re Port Arthur and Rainy River Provincial Election, 9 O. W. R. 347, affirming the ruling of the rota Judges, is that upon a scrutiny the voters' lists are final and conclusive evidence of the right of the persons

named therein to vote, and the questions whether persons who have voted were at the time of the full age of 21 years and British subjects, cannot be inquired into.

Settlement.]—The settlor by his will purported to revoke a family settlement, appearing on its face to be made in consideration of marriage, and executed after the fullest consideration and advice of a solicitor. Clute, J., held that, in the absence of fraud, misrepresentation, or mistake, such attempted revocation was ineffectual: Howland v. Macdonald, 9 O. W. R. 337.

Street Railways.]—It is decided by Britton, J., in Re Town of Berlin and Berlin and Waterloo Street R. W. Co., 9 O. W. R. 412, that, upon a municipality taking over a street railway under ss. 41 and 42 of R. S. O. 1897 c. 208, the value or price is to be ascertained as of a railway in use, and capable of being operated as a street railway, in this sense the railway to be considered as a going concern, but, on the other hand, nothing is to be allowed for the value of any privilege or franchise.

Trade Name.]—The plaintiffs were incorporated in the state of New York under the name of "The National Casket Company of the United States." Their goods, which were finer and more costly than any made in Canada, were sold here. Subsequently the defendant, who had carried on a similar business for many years under the name of "The Eckhardt Casket Co.," resumed business, in April, 1906, after having been burned out by the great fire of April, 1904, advertising as "The National Casket Company and National Silver Plate Company, A. J. H. Eckhardt, proprietor," and stating that "the company is the successor of the Eckhardt Casket Company and the Eckhardt Silver Plating Company." MacMahon, J., in the circumstances, held that there was no fraud intended and none perpetrated, and no infringement of the plaintiffs' rights: National Casket Co. v. Eckhardt, 9 O. W. R. 313.

Will.]—The words "at the death of both my said daughters Mary and Sarah that the land hereinbefore devised to them be sold, and the price thereof be equally divided between the children of my said daughters Mary and Sarah or their legal representatives," were held by Anglin, J., in Re Ianson, 9 O. W. R. 278, not to disclose such an intention that the gift to such children should be per stirpes as to take the case out of the general rule that under a gift to the children of two named persons as a class the children take per capita.

CASES FROM WESTERN CANADA.*

Administrator Pendente Lite.]—Affirming the ruling of the Referee in Chambers, Mathers, J., in Tellier v. Schliemans (Man.), 5 W. L. R. 261, decided that the former has no jurisdiction to appoint an administrator pendente lite.

By-law.]—The uncertainty arising from the fact that by mistake the council of the plaintiff corporation enacted that after the word "any" in the first line of a by-law imposing a tax on persons following certain callings, should be read the word "profession," whereas the word "any" did not appear in the first line of the original by-law, but in the second, and was used three times in all, was held by Lampman, Co.C.J., in City of Victoria v. Belyea (B.C.), 5 W. L. R. 161, even giving the amendment the benevolent construction called for in the case of municipal by-laws, fatal to the reading of the by-law and amendment so as to impose such tax upon a solicitor.

Certiorari.]—It is laid down by Mathers, J., in Rex v. Hunter (Man.), 5 W. L. R. 268, that an application for a writ of certiorari is properly made to a Judge in Chambers at any time when the Court of Appeal, or the full Court of King's Bench, is not sitting. Also that all further proceedings, after the return, must be taken in one or the other of those Courts.

Charge on Land.]—The defendant charged certain lands in favour of the plaintiffs as additional security for the payment of the price of certain machinery, and subsequently conveyed such lands, "according to his estate and interest therein," and "as fully and effectually" as he lawfully could, by an assignment for the general benefit of his creditors, to his assignee. Mathers, J., held that by the language

* Short notes of the most important cases in Volume V. of the Western Law Reporter, Nos. 3 and 4, pp. 137 to 328, inclusive.

of the deed of assignment the assignor had excepted from its operation the plaintiffs' equitable interest, and that the assignee took the land subject to the plaintiffs' charge. For the reason given, ss. 6 and 7 of the Assignments Act, s. 72 of the Registry Act, and s. 7 of the Lien Notes Act, were held to be of no avail to the assignee: Canadian Port Huron Co. v. Burnett (Man.), 5 W. L. R. 270.

Chattel Mortgage.]—In McDonald v. Scearce (Y.T.), 5 W. L. R. 324, Macaulay, J., restrained the sale of certain goods by a first mortgagee thereof, at the instance of a second, without requiring payment into Court of the amount due on the first mortgage, because the first mortgagee had been in receipt of the proceeds of the sale of a portion of the goods mortgaged, and had refused to account for such proceeds, which were more than the amount due on his mortgage, and, at the same time, it did not appear that the mortgagor was otherwise indebted to him.

Chose in Action.]—The assignee of a mortgage debt was held by Mathers, J., in Campbell v. Canadian Co-operative Investment Co. (Man.), 5 W. L. R. 153, to be liable by virtue of s. 29 of the King's Bench Act, s.-s. (f), to have set off against the same, a liability incurred before notice of the assignment by his assignors, by reason of their neglect in carrying out an undertaking by them to transfer the insurance upon the mortgaged property to another company.

Company.]—The insurance of properties covered by a loan and investment company's mortgage, was held, by Mathers, J., in Campbell v. Canadian Co-operative Investment Co. (Man.), 5 W. L. R. 153, to be, as a necessary part of such a company's business and of frequent occurrence, business of such a nature that the company could enter into a binding contract, in the usual form of such contracts, without its corporate seal.

Constitutional Law.]—It is decided by the Supreme Court en banc in Rex v. Lincoln (N.W.P.), 5 W. L. R. 301,

Stuart, J., dissenting, that, by analogy to the case of the provinces of Quebec and Ontario, where in every case where an Act applicable to the two provinces can now be repealed by one of them, the result must be to leave the Act in full vigour within the other province, the Alberta Medical Act is ultra vires of the legislature, as being in effect a repeal of the Medical Profession Ordinance, under which persons registered thereunder have a right to practise medicine in Alberta.

Contract.]—The agreement in respect of which the action of Halpin v. Fowler (No. 2) (B.C.), 5 W. L. R. 226, was brought, was held by the full Court, Martin, J., dissenting, to be neither a lease nor a license, inasmuch as there was no defined area of which exclusive possession was given (the width not being stated), and the property in the ore was not intended to be given to the plaintiff. On the contrary, he was to sort out and ship the ore to such consignees as the defendant might from time to time direct, and the latter, after deducting certain allowances, was to pay the balance only of the proceeds to the plaintiff. In the circumstances, it was held that there could not be any covenants implied as relied on by the plaintiff.

Criminal Law.]—Two men passing near the scene of an alleged murder saw the deceased apparently fleeing from the accused, who appeared to be pursuing him with something in his hand, which looked like and turned out to be a gun. The deceased was waving his hands to them to stop, and made use of the expression: "Hold on, hold on; he shot me, and he will shoot me again. Hold on, boys, hold on." This was immediately after the shooting. The Supreme Court en banc held that evidence of the use of these expressions was admissible on the trial of the accused for deceased's murder, there being such continuity as to make them part of the res gestæ. Another expression at a later time and in no way connected with the res gestæ, "Don't let him knife me," used in the presence of the accused and

others, was also held admissible, not as a statement of fact made in the presence of the accused, not being susceptible of denial, but as shewing the deceased's state of mind. Wetmore, J., dissented as to this latter expression, holding that it was not an expression of fear alone, and, not being heard by the accused, evidence of it should not have been admitted, or such evidence should have been withdrawn from the consideration of the jury: Rex v. Gilbert (N.W.P.), 5 W. L. R. 295.

Discovery.]—Empire Manufacturing Co. v. Levy (B.C.), 5 W. L. R. 183, was an action upon a guarantee purporting to have been given in consideration of a commission for the payment of the price of goods sold by the plaintiffs to one Bennett, and which was signed "L. Levy & Co." Under this name, it was alleged Rebecca Levy carried on a business which was under the entire management of her husband L. Levy and his two sons. She denied any personal knowledge of this document or transaction, and filed an affidavit of documents in which no mention was made of the books of account of the defendant firm. It was in issue whether the husband was a partner in the firm as well as manager. The full Court on appeal, Irving, J., dissenting, affirmed the order, based on the non-production of such books, of the Judge of the County Court of Kootenay requiring her to file a further and better affidavit on production.

Dismissal of Action.]—The action of Gray v. Balkwill (N.W.P.), 5 W. L. R. 257, was practically an action for the issue of a writ of habeas corpus, with incidental claims that the defendant deliver to the plaintiff the latter's infant child, and for an injunction. Wetmore, J., under Rule 151 of the Judicature Ordinance, dismissed the action, pointing out there are two methods by which a parent may obtain the custody of his child—by writ of habeas corpus and by petition to the Court of Chancery—and that it was improper to institute an action for the issue of the writ, while, in spite of Cassey v. Cassey, 15 Gr. 399, and Munro v. Munro,

15 Gr. 431, the jurisdiction of the Court to grant relief on petition must be exercised under the method pointed out by the practice.

Fixtures.]—The Bank of British Columbia, predecessors in title of the plaintiffs in Canadian Bank of Commerce v. Lewis (B.C.), 5 W. L. R. 194, an action to recover a safe or the value thereof, had leased certain premises from the Canadian Pacific R. W. Co., in which was the safe, around which the company, at their request, built a brick vault, wherein the safe stood upon a cement foundation. Afterwards the brick vault was removed, and a mazzanine floor or gallery constructed across one end of the office, resting partly propped on the safe. To remove the safe from the building, openings would have to be made in the walls of the building, the doorways not being wide enough, and the floor materially strengthened. The Bank of British Columbia had an arrangement with the company by which they could remove the safe, but did not remove it. The defendant was a purchaser from the company, and had made no arrangement with the vendors about the safe. The full Court held (Martin, J., dissenting), that the safe had become annexed to the freehold and that the plaintiffs could not recover.

Judgment Debtor.]—An appeal by the defendant in Fraser v. Kirkpatrick (N.W.P.) from the order of Scott, J., 4 W. L. R. 317, noted 26 C. L. T. 598, was dismissed by the Supreme Court en banc: 5 W. L. R. 287.

Jury.]—An instructive discussion upon the right to trial by jury in civil cases is to be found in the judgment of Mathers, J., in Griffiths v. Winnipeg Electric R. W. Co. (Man.), 5 W. L. R. 149. Exercising the discretion conferred by the Queen's Bench Act of 1895, as to granting a trial by jury, the Court ordered the case to be so tried, for the reasons that the plaintiff's injury was the loss of an arm, and not one disabling him temporarily only, and was therefore one in respect of which the concurrent opinion of sev-

eral jurymen as to the damages sustained was more likely to be correct than that of one Judge, and that the case turned upon the simple question of fact whether the defendants were guilty of the acts of negligence, and the plaintiff guilty of the act of contributory negligence, charged.—— It was decided by the full Court in Blue v. Red Mountain R. W. Co. (B.C.), 5 W. L. R. 233, Martin, J., dissenting, that a statement in the charge of the trial Judge, that the jury should judge whether they could from their inspection determine whether the fire which did the damage sued for was a continuation of that upon the defendants' right of way, regardless of what was said for or against, followed by questions as to whether they believed the evidence on the point of the plaintiffs or defendants was conclusive, did not involve misdirection.

Mechanics' Liens.]—The full Court, in British Columbia Mills Timber and Trading Co. v. Horrobin (B.C.), 5 W. L. R. 275, held that the defendant H. was not entitled to set off against the amount of the plaintiffs' claim for a mechanic's lien a certain payment of $1,000. It appeared that H.'s co-defendant, the contractor, had given his cheque to the plaintiffs for such sum without making any application of the payment, thereby overdrawing his account with the bank to nearly that amount. This overdraft was covered by the deposit of H.'s cheque for $1,200, marked so as to shew its intended application to the account in question, but it did not appear that the plaintiffs had at the time of payment any knowledge of the source from which it came. They applied the payment upon a note which they held against the co-defendant.

Mortgage.]—The defendant company, in Campbell v. Canadian Co-operative Investment Co. (Man.), 5 W. L. R. 153, having undertaken with the plaintiff to transfer the insurance upon property of the plaintiff, of which they were the mortgagees, to another company, and prevented a renewal with the company then carrying the insurance, their

assignees were held by Mathers, J., liable to a set-off in the plaintiff's favour, against the mortgage debt, of the amount of the loss occasioned him by their neglect to properly effect the proposed transfer. The facts that the first-named company had notified the insurers not to renew the policy, and had written to the proposed insurers notifying them of the intended change, and asking them to have their agent report upon the property, were held to bring the case within the rule of law that, where a person has undertaken to perform a voluntary act, he is liable if he perform it improperly, though not if he neglects to perform it.

Municipal Corporations.]—An important decision is that of Harvey, J., in Clark v. City of Calgary (N.W.P.), 5 W. L. R. 292, that there is no liability on the part of the corporation of the city of Calgary for injuries caused by the non-repair of streets and sidewalks, because no duty, other than the ordinary duty to the public, is by the city's Ordinance imposed on the corporation, and, having reference to s. 2 of the Municipal Ordinance, s. 87 of the latter Ordinance can have no application.

Negligence.]—A tug of the defendants, with a loaded barge lashed to her, approached the fairway under a span of a bridge, and, seeing that the same was partly obstructed by a scow moored to the pier, slowed down and stopped, but on getting closer the captain thought the opening wide enough to get through, and attempted to do so, with the result that the tug brushed against the scow and crushed the plaintiff, who was at the other end on a boom stick, against a pile, causing injuries for which the plaintiff sued. The judgment of Morrison, J., dismissing the action was set aside by the full Court, and judgment directed to be entered for the plaintiff. The Court considered that it was the duty of the captain of the tug to make certain that he could go through without doing any damage, and, failing that, to delay his passage until it was safe to proceed, and to avail himself of his proper remedy by action if he was damnified by delay in

unblocking the fairway: Padularoga v. Canadian Canning Co. (B.C.), 5 W. L. R. 196.——The plaintiff's stack took fire from a spark from the engine of the defendants, whom he had employed to thresh his grain. The two spark arresters on the engine were open at the time, and to this was due the escape of a spark sufficient to do the injury. Wetmore, J., held that, apart from the Prairie Fire Ordinance, there was such negligence on the part of the defendants as to render them liable. If the plaintiff had, as alleged, designated the place for the engine, this would not have constituted contributory negligence, because if the arresters had been kept closed the fire would still have been prevented: Gibson v. Wickham (N.W.P.), 5 W. L. R. 319.

Petition of Right.]—Though the Provincial Secretary had written on the 4th May refusing to submit the plaintiff's petition of right to the Lieutenant-Governor, after the matter had been brought before the executive council, the full Court in Norton v. Fulton (B.C.), 5 W. L. R. 203, Irving, J., dissenting, held that, while such refusal had, by virtue of s. 4 of the Crown Procedure Act, created a good cause of action, in respect of which the plaintiff sued, the trial Judge had acted rightly in withdrawing the case from the jury and dismissing the action with costs up to the time of the delivery of the defence, inasmuch as the defendant had, on the 21st June, after the action was brought and the day before delivering his defence, submitted the petition, when the fiat was refused, and such refusal was within a reasonable time of the request made upon the Provincial Secretary.

Power of Sale.]—It was held by the full Court in Jenns v. Keith (B.C.), 5 W. L. R. 209, Martin, J., dissenting, that a contract under which it was agreed that certain lands were to be conveyed by one party to another, and that the latter "after selling any of the lands so conveyed" should be entitled to certain sums for commission, advances, and expenses, whereupon the balance should be equally divided

between the parties, conferred power upon the former to make a sale on credit.

Practice.]—As an answer to the plaintiff's claim for moneys due under an agreement, the defendant filed a dispute note and set up a counterclaim for damages for breach of covenants contained in the agreement. Afterwards each party consented that the other be at liberty to amend as he might be advised, but, before this had been done, the defendant proposed to the plaintiff that the action be transferred to the Supreme Court. The plaintiff did not see his way to assent to this, and the defendant then filed a new dispute note without any counterclaim, and commenced an action in the Supreme Court in respect of the subject matter of the counterclaim. At the trial the defendant moved for leave to withdraw the counterclaim, but, on the plaintiff's motion, it was dismissed by Forin, Co.C.J., with costs. The full Court, Martin, J., dissenting, ordered that an appeal by the defendant be allowed, with a declaration that there was no counterclaim before the trial Judge for adjudication: Halpin v. Fowler (No. 1) (B.C.), 5 W. L. R. 222.

Principal and Agent.]—The plaintiff in Philip v. Bauer (B.C.), 5 W. L. R. 187, claimed commission on the purchase by the defendant of a block of land in North Vancouver. He had admittedly brought the defendant into negotiation with the vendors, but on the 4th June the former notified him that he would not pay the price asked, $50,000, and that the deal was off. The defendant resumed negotiations, and in the middle of the following October purchased the property at the price named. The full Court, Martin, J., dissenting, considering that there was no want of bona fides on the part of the defendant, allowed an appeal by the defendant from the judgment of Morrison, J., in favour of the plaintiff, holding that the purchase in October was an independent transaction.

Railway.]—The full Court, Martin, J., dissenting, allowed an appeal from the judgment of Irving, J., at the trial,

in favour of the defendants in Coen v. New Westminster Southern R. W. Co. (B.C.), 5 W. L. R. 209, an action for the value of the plaintiff's mare, alleged to have been killed on the defendants' railway, through the defendants' negligence in not maintaining gates at a farm crossing, holding that, since it was not shewn that the mare was unlawfully at large by reason of some local by-law, or that the plaintiff was guilty of negligence or misconduct, the animal was lawfully at large, as she might be under the conjoint provisions of the Animals Act and the Fence Act, and that she was not therefore "wrongfully upon the railway" under s.-s. 3 of s. 194 of the Railway Act, 1888, which was read into the defendants' Act of incorporation. Martin, J., considered that, since the animal, to get upon the railway at the crossing suggested, must have passed over the land of another than her owner, the defendants should not be held liable, for the enactments mentioned conferred no rights upon the owner of a straying animal, but provided simply that no trespass shall, in such case, be deemed to have been committed.——The question arose in Blue v. Red Mountain R. W. Co. (B.C.), 5 W. L. R. 233, whether the fire causing the damage sued for had originated upon the defendants' right of way. The defendants had not filed any plans of their right of way either at Victoria or Ottawa. The full Court held that, in the absence of any evidence on the part of the defendants as to what constituted the right of way, it was reasonable, in the circumstances, to conclude that the right of way was not confined to the road-bed, but that the defendants had occupied the full statutory allowance.

Sale of Goods.]—The defendant having failed to return certain threshing machinery and gone on using it after the plaintiffs had intimated that they intended to make no further attempt to remedy defects, Stuart, J., in Sawyer and Massey Co. v. Thibart (N.W.P.), 5 W. L. R. 241, held that the defendant could not avail himself of an express warranty in the contract of purchase as a defence to an action for the

price, but that under s. 16, s.-s. 1, of the Sales of Goods Ordinance, he was entitled to damages as for breach of an implied warranty that the outfit in question was reasonably fit for threshing grain for hire, and that this implied warranty was not inconsistent with an express warranty that the articles in question were of good material and durable with good care, and would with proper usage and skilful management do as good work as any of the same size sold in Canada. Though each of the articles comprising the outfit would come under the definition of specified articles under a patent or trade name, it was held that, the contract not being divisible, the combination could not be so considered. A clause that there were no other warranties or guaranties, promises or agreements, than those contained in the contract, was held not to include the implied statutory condition.

Security for Costs.]—Moore v. Scott (Man.), 5 W. L. R. 147, is a decision of Mathers, J., in affirmation of the rule laid down in Standard Trading Co. v. Seybold, 5 O. L. R. 8, 1 O. W. R. 724, that "increasing or diminishing security (for costs) already given is a matter for the exercise of judicial discretion, having regard to all the circumstances of each case." The defendants having taken a præcipe order which could be satisfied by paying $200 into Court, instead of making a special application for reasonable security, were held not to be bound by their election.

Trade Mark.]—The use in an advertisement of the words "George A. Slater Invictus Shoes," such shoes being actually manufactured by George A. Slater, was held by Mathers, J., in Slater v. Ryan (Man.), 5 W. L. R. 142, in the absence of circumstances to indicate that the goods advertised were so advertised for the purpose of falsely representing them as the goods of George T. Slater and Sons, not to be an infringement of the trade mark of the latter company, consisting of a wooden slate frame with the words "the Slater Shoe" inscribed within it, although, had it been shewn that

the defendant was aware that in this advertisement as it first appeared the words "Slater" and "shoes" were printed in larger type than the other words, there would have been shewn an intention to mislead which would have constituted an infringement.

Trial.]—In an action against the Provincial Secretary for damages for refusing to submit a petition of right to the Lieutenant-Governor, pursuant to s. 4 of the Crown Procedure Act, where it appeared that after action brought, but within a reasonable time after the request for the presentation of the petition was made, the petition had been presented by the defendant and the fiat refused, the full Court (Irving, J., dissenting, on the ground that the jury could, if they would, have awarded exemplary damages), held that the case was properly withdrawn from the jury, by virtue of the inherent power of the Court to prevent the further employment of its machinery unnecessarily: Norton v. Fulton (B.C.), 5 W. L. R. 203.

Water and Watercourses.]—It was held by the full Court in Esquimalt Waterworks Co. v. City of Victoria (B.C.), 5 W. L. R. 173, in allowing an appeal by the defendants from the judgment of Duff, J., 4 W. L. R. 59, noted 26 C. L. T. 653, that the waste waters of Goldstream were not used for any "beneficial purpose," and must therefore be considered as "unrecorded," and that the defendants, having the right under the Act of 1873 to take the waters of Goldstream, were entitled to take these waste waters under the Water Clauses Consolidation Act, 1897. Morrison, J., expressed the view that the plaintiffs, not being a power company, their contract with the British Columbia Electric Railway Co. to supply water for power purposes was ultra vires, and that, therefore, such use of the water of Goldstream being the only use thereof by the plaintiffs, there was no use at all of the waters of Goldstream for a "beneficial purpose." Hunter, C.J. (dissenting), was of opinion

that the judgment of Duff, J., should be affirmed with a variation as to the counterclaim.

Will.]—A provision in a will, "I desire my trustees to divide all my estate share and share alike among my children and to pay," etc., was held by Harvey, J., in Re Sandison (N.W.P.),5 W. L. R. 316, not to create vested interests in the children, in view of the fact that under the terms of the will each child was not entitled to any particular portion of the income, but only to so much as might be necessary for education and maintenance. "To divide and to pay" was held to have no different meaning from "divide and pay."

DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.*

Company.]—In In re Fredericton Boom Co. (N.B.), 2 E. L. R. 451, Tuck, C.J., considered the question whether there was a discretion in the Court to refuse the petition of a creditor for a compulsory winding-up order under the Dominion statute, where the company applied at the same time for a voluntary winding-up order under the provincial statute C. S. N. B. 1903 c. 90. He was of opinion that a boom company came within the definition of a trading company in R. S. C. 1886 c. 129, s. 2 (c), and that, insolvency being shewn, such a company was liable to be wound up under c. 129, and the provincial statute could not be applied.

Habeas Corpus.]—The practice in regard to the writ of habeas corpus was considered by Hodgson, J., in In re McMurrer (P.E.I.), 2 E. L. R. 436, and he gave rulings on several objections raised by the Attorney-General upon a motion made upon the return of the writ for the discharge of the prisoner. The writ may be issued by any Judge in vacation; it does not issue as a matter of course; it must be grounded on an affidavit of a probable reasonable ground for the complaint, made by or on behalf of the prisoner, on which the Judge is bound to exercise his reasonable discretion. It was urged by the Attorney-General that the habeas corpus should not have been general, that is, that it should have stated the grounds of objection to the prisoner's detention. "I entirely differ from this," said the learned Judge; "no instance can be found in which the writ is otherwise than general:" 1 Chit. 693. It was also contended that a rule should have been issued, under which the return might have been sent up by the gaoler without bringing up the

* Short notes of the most important cases in Volume II. of the Eastern Law Reporter, Nos. 9 and 10, pp. 417 to 500, inclusive.

prisoner. "It is true that when the writ was applied for I did suggest a rule as being the easier and quite as effective a remedy as the writ. The prisoner's counsel . . . pressed for the writ. He was quite within his rights in this, because the prisoner has a right to be present at the argument of the motion for his discharge and to hear what is alleged as to why he should be detained. The granting of the rule is for the benefit of the prisoner only." Objection was likewise taken by the Attorney-General to the notice given by the prisoner's solicitor to the committing magistrate and the prosecutor that the prisoner would be brought up before the Judge "in order that he may be discharged out of custody." This was held to be perfectly correct in form. Again, it was suggested that it was requisite to serve a notice of the writ upon the Attorney-General. As to this the Judge said: "The prisoner's counsel was quite in accord with the practice when he confined the service to the prosecutor and the convicting magistrate. The practice requires nothing further, nor shall I. I think that the greatest care should be exercised lest obstacles are created and the issue of the writ obstructed."

Illegal Contract.]—The full Court in Wilkins v. Wallace (N.B.), 2 E. L. R. 460, gave effect to a defence of illegality avoiding the contract sued upon. The plaintiff was the manager of the defendant's hotel at Moncton, where the Canada Temperance Act was in force. He bought at St. John a stock of intoxicating liquors, the price of which was charged by the seller to him personally. He alleged that the purchase was made by him under an arrangement with the defendant, and sued her for the price, the goods having been sent to and actually used in her hotel. Both the plaintiff and defendant knew that the Act was in operation in Moncton, and that selling intoxicating liquors there was contrary to law. The Court found that there was an arrangement between the plaintiff and defendant that the plaintiff should come to St. John and buy the liquors for the defendant's

hotel, and that they should be shipped to Moncton, there to be sold at the hotel. "As regards the illegality," said Tuck, C.J., delivering the judgment of the Court, "the plaintiff and defendant are in pari delicto. If the plaintiff purchased the liquors for himself, then he sold them to the defendant, and cannot recover. If he acted as her agent for an illegal purpose, he is equally guilty with her, and cannot recover. They are leagued together, and the act of the one is the act of the other."

Justice's Court.]—The question whether a County Court Judge had, in the circumstances of the case, jurisdiction to review the judgment of a magistrate's court, divided the Supreme Court of New Brunswick in Rex v. Wilson, Ex p. Burns (N.B.), 2 E. L. R. 442, the order in review being brought before the Supreme Court by certiorari, and a motion made to quash it. In the justice's court Burns recovered a judgment against Myers for $30, which the County Court Judge set aside with costs, which he taxed at $24.50; and he also ordered that the cause be remitted to the justice for a new trial according to C. S N. B. 1903 c. 122, with the alternative that if the plaintiff did not bring the cause on for another trial within two months of the service of the order, a verdict should be entered for the defendant. The provision for review is contained in s. 6 of the Act mentioned, that the County Court Judge may, at any time within 30 days after the judgment, or after obtaining a copy and minute of the proceedings, appoint a time and place for hearing, etc. The judgment was given on the 26th August, 1905, and the application to the County Court Judge was not made until the 20th December. No explanation of the delay was given by the affidavit laid before the County Court Judge to obtain the order for hearing. Five Judges took part in the judgment of the Supreme Court upon the motion to quash the order of the County Court Judge. Gregory, J., was of opinion that the order should be quashed because the Judge had no jurisdiction unless the delay was satis-

factorily explained. The Chief Justice also thought that the order should be quashed, but apparently because, in his view of the facts, the application to the County Court Judge was not made within 30 days after the defendant could have obtained from the justice the "copy and minute of the proceedings." The remaining three Judges, however, for divers reasons, agreed that the order should not be quashed; one of them, Hanington, J., thinking that the Judge had no discretion, because the affidavit stated, and the fact was, that the application was made within 30 days after the defendant had actually received the papers from the justice. Upon another point taken, four out of the five members of the Court agreed that the Judge had power to make the order for a new trial upon the terms set forth. In the result the rule was, we suppose, discharged.

Mortgage.]—No important principle is deducible from the opinion of Barker, J., in Patchell v. Colonial Investment and Loan Co. (N. B.), 2 E. L. R. 417, but the decision is of practical value. The action was for redemption by mortgagor against mortgagees. The only question of law arising upon the account of the defendants as mortgagees was whether they were entitled to the costs of proceedings taken under the power of sale. The premises were offered for sale at auction, and were bid in by an agent of the defendants, to whom they conveyed, and who reconveyed to them. The sale was therefore abortive as an execution of the power, and did not prejudice the plaintiff as to her right to redeem. It was held, nevertheless, that the defendants were entitled to the costs of the proceedings, but not to the costs of a conveyance to the agent.

Municipal Corporations.]—The decision of Meagher, J., in Hart v. City of Halifax (N. S.), 2 E. L. R. 118, noted ante 71, was reversed by the full Court: 2 E. L. R. 468. The action was by a ratepayer for a declaration that payments made out of the city treasury to the mayor and city engineer for their expenses as delegates to a convention of Canadian

municipalities were illegal, and for repayment of the amounts into the treasury by the mayor and engineer, who were made defendants. Meagher, J., held that the action was not maintainable by the plaintiff without joining the Attorney-General. Graham, E. J., who delivered the leading opinion of the Court as constituted for the hearing of the appeal, said: "In this case I think the corporation have a special interest in the money sought to be recovered, and that they would have the right to sue for it; and that the ratepayers, the council having refused to bring an action in the name of the corporation, or to allow the name to be used, have the right to sue in the interest of the corporation. Where the corporation could sue, if it would, without the Attorney-General joining in the complaint, the ratepayers can sue without him." The status of the plaintiff being thus established, the Court proceeded to consider the liability of the mayor and engineer to refund. It was held (Longley, J., dissenting), that the mayor as a member of the council must be held to have had notice that the statute did not permit the expenditure, and that there was no appropriation of funds for the purpose, and that he was therefore liable to repay the money he had received. With regard to the city engineer, however, it was the unanimous decision of the Court that, having been instructed by the board of works to go to Winnipeg, and having done so, for general purposes in the interest of the city, and the payment of his expenses having been authorized by the council, he was not required to know that the city charter and the ordinances did not allow the payment to be made, and having acquired the money in payment of his expenses, without notice, no implied contract to repay it had arisen; and the dismissal of the action as to him was therefore affirmed.

Police Magistrate.]—That the police magistrate for the county of Westmorland (sitting at Shediac, in that county) has jurisdiction to convict for an offence against the Canada Temperance Act committed in the city of Moncton, also in

that county, notwithstanding the statute 2 Edw. VII. c. 11 (N.B.), is the point decided by the full Court in Rex v. McQueen, Ex p. Landry (N.B.), 2 E. L. R. 457.

Sale of Goods.]—In Mitchell Co. v. Simson Co. (N.S.), 2 E. L. R. 484, an action for the price of goods sold, it appeared that the goods were destroyed by fire before they actually reached the defendants' hands. On the 24th February, 1904, the defendants at Halifax telegraphed to the plaintiffs at Toronto: "Duplicate last order cassia." The previous order included "25 bales selected broken cassia, terms as usual, 9¾." The plaintiffs telegraphed on the same day informing the defendants that they had cabled the order. On the 19th March, 1904, the plaintiffs wrote the defendants: "A few days ago we received confirmation of your order for China cassia at 10 cents, which price we accepted, as the market will undoubtedly go higher." And on the 24th March, 1904, the defendants wrote: "We have yours of the 19th here, and note that you have placed our order for broken select cassia at 10 cents, shipment later, and we are herewith confirming this." The cassia, with a like amount for S., another Halifax customer, was shipped at Hong Kong to Halifax, and arrived there in August, and was unloaded on the Plant wharf. On its arrival, the plaintiffs' brokers, to whom it was addressed, passed the goods at the customs and paid the duties and all charges. A member of that firm went down to the Plant wharf, examined the cassia, and said it was in good condition. He paid the freight, detached the delivery stub from the freight bill, and gave it to the wharfinger. Then he sent the defendants a written order upon the wharfinger to deliver the 25 bales of cassia to the defendants. This was received by a clerk of the defendants on the 12th August, but they did not send for the cassia, and on the 5th September it was destroyed by fire at the wharf. S. had got his 25 bales. It appeared that the secretary of the defendants was the person to look after the shipment, and he was not informed of the delivery order till after the fire.

Graham, E.J., was of opinion that there was a sufficient delivery of the goods. There was an appropriation by the vendor of 25 bales to the defendants when the wharfinger delivered 25 bales to S. at the instance of the brokers, leaving 25 bales there. That appropriation could not be recalled; and there was a previous assent on the part of the defendants to a selection of 25 bales for them. It was then that the goods passed. Although, by the course of dealing between the parties, if the goods were damaged there was a right to reject them, or a right to weigh and deduct from the price, that did not prevent the goods from passing—they being in a deliverable state. It was contended that there was not a sufficient memorandum of the bargain within the Statute of Frauds; but it was held that the price and terms of payment were sufficiently stated, and that parol testimony could be given to explain what the usual terms referred to in the previous order were. The place of delivery was not mentioned in the contract, but it was said that it was not necessary, to satisfy the statute, that the memorandum should state all the terms of the consideration.

Warrant of Commitment.]—In In re McMurrer (No. 2) (P.E.I.), 2 E. L. R. 466, the excessively fine point was raised upon habeas corpus that because the warrant committing the prisoner to custody was addressed to "all or any of the constables or other peace officers of the county," and because the prosecutor, being a justice of the peace for the county, was as such a peace officer, the warrant might be said to be addressed to him, and therefore was void, because, it was contended on the authority of a decision of Palmer, C.J., in 1886, a warrant must not be addressed to the prosecutor. In that case, however, as was pointed out by Hodgson, J., the prosecutor executed the warrant, and there was no pretence that the prosecutor here could or did execute the warrant—a justice of the peace does not execute warrants. The prisoner was remanded to custody.

EDITORIAL REVIEW.

The Silk Industry.

A silk manufacturing industry is about to be established in Toronto by a Frenchman. The "silk" industry established in the Queen's park, Toronto, by the late Sir Oliver Mowat, seems to have been shut down. Competition is the life of trade; Mr. Attorney-General Foy may take heart of grace from the rivalry of the alien.

An Amusing Head-Line.

The legal column of a daily newspaper not long ago contained a report of a judgment in an action for criminal conversation. It is the custom of the editor of the paper to draw attention to any matters of special interest in the legal column by means of head-lines in large type. This case was singled out by the enterprising editor for special attention, and the head-lines were: "A Talk that Cost Money—Defendant Pays Damages for Criminal Conversation!" The innocent editor!

The Thaw Case.

The newspapers have been full of accounts of the trial of a man named Thaw for the killing of one Stanford White. The killing was not denied, but it was alleged in Thaw's defence that he had a mania for killing or an irresistible insane impulse to kill such a man as White, and also that the homicide was justifiable. The trial lasted for many weeks, and in the end the jury disagreed. The reports, eagerly read by every one, disclosed on the part of counsel for the people a most unseemly desire for a conviction, on the part of counsel for the defence the mistaken policy of appealing to mushy sentiment rather than to reason in endeavouring to capture the jury, and in the presiding Judge an inability to control, or an abstention from controlling, the course of the trial.

Altogether a flagrant mistrial; no wonder the jury disagreed. These things are much better managed in England, as witness the recent and not dissimilar case of the trial of the murderer of Whiteley, which was disposed of in one day's sitting. Even in Canada, 'umble as we are, we do much better.

Martin's Mining and Water Cases.

We have referred before to the series of mining reports ably edited by Mr. Justice Martin, of the British Columbia Supreme Court Bench. In volume I. and part 1 of volume II. will be found all the British Columbia and some important Yukon mining cases carefully revised and annotated, with a very full digest, and all the mining statutes up to the 1st March, 1905. Many important mining and water cases have been decided since then, and others are standing for judgment or waiting a hearing, and therefore part 2 volume II. is in preparation, and will include all such cases and also the statutes up to the end of July, 1907. The decision to include water cases is a wise one, as the two subjects are closely connected. The Ontario Mines Act, 1906, has in many respects substantially the same provisions as the Mineral Act of British Columbia, and the decisions of the Courts of the latter province contained in this series will be of great assistance to Ontario lawyers and mining men.

Recent American Decisions.

Carriers.—A stipulation in a steamship ticket limiting liability for baggage to a certain amount, unless the excess value is declared and paid for, is held, in Holmes v. North German Lloyd Steamship Co. (N.Y.), 5 L. R. A. (N.S.) 650, not to apply to baggage intended to be taken by the passenger to the stateroom for use during the voyage.

A street car company which undertakes to give a convention of women delegates visiting the city a free ride over its line by the use of its cars under the control of its servants, is held, in Indianapolis Traction & T. Co. v. Lawson (C. C.

App. 7th C.), 5 L. R. A. (N.S.) 721, to be bound to use at least ordinary care, and to be liable for injuries resulting from its failure to do so.

The liability of a railway company for indignities offered by its conductors to a passenger who, because of its fault in not having an agent at a terminal point, where the passenger is to exhibit an order for a ticket, attempts to pursue his journey upon the order without the ticket, and is insulted and threatened with ejection by the conductor, is sustained in Cincinnati, N. O. & T. P. R. Co. v. Harris (Tenn.), 5 L. R. A. (N.S.) 779.

Failure of a railway company for eleven days to forward property delivered to it for transportation is held, in Alabama G. S. R. Co. v. Quarles & Couturie (Ala.), 5 L. R. A. (N.S.) 867, to prevent its escaping liability in case the property is destroyed by act of God, which would not have resulted had the property been forwarded promptly. A carrier whose negligent delay in transporting goods committed to him for that purpose subjects them to destruction by act of God is held, in Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. (Iowa), 5 L. R. A. (N.S.) 882, not to be able to escape liability on the theory that such result could not have been anticipated.

It is held, in Patterson v. Old Dominion Steamship Co. (N.C.), 5 L. R. A. (N.S.) 1012, to be the duty of a steamship company running a night boat to supply berths to unobjectionable passengers in the order of application.

One who induces the conductor to permit him to ride for less than the regular fare is denied, in Grahn v. International & G. N. R. Co. (Tex.), 5 L. R. A. (N.S.) 1025, the right to hold the railway company liable for the act of the conductor in compelling him to leave the train in a reckless and negligent manner.

Contempt of Court.—Participation in the murder of a prisoner under sentence of death in a state court, with intent to prevent the delay attendant upon an appeal to the Federal

Supreme Court from an order of the circuit court denying relief by habeas corpus, and to prevent the hearing of such appeal, is held, in United States v. Shipp, Advance Sheets, U.S. (1906) 165, to be a contempt of the Supreme Court, where such murder was committed after the appeal had been allowed, and that court had ordered that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal."

Insurance.—A provision in an insurance policy that it shall be void if the insurer has other policies in force on the same life, unless consent to the additional insurance is indorsed thereon, is held, in Monahan v. Mutual L. Ins. Co. (Md.), 5 L. R. A. (N.S.) 759, to be waived by a receipt of premiums on the new policy, the beneficiary in which is ignorant of the former insurance, although, by reason of faulty bookkeeping, the attention of the insurer was not in fact called to the breach of condition.

A provision in an insurance policy exempting the insurer from liability for death resulting from poison or infection is held, in Cary v. Preferred Acci. Ins. Co. (Wis.), 5 L. R. A. (N.S.) 926, not to apply where an accidental abrasion of the skin is followed by bacterial infection, blood poisoning, and death, since the infection is held not to be the proximate cause of the death.

A provision in a health-insurance policy for indemnity for blood poisoning is held, in Jones v. Pennsylvania Casualty Co. (N.C.), 5 L. R. A. (N.S.) 932, not to be destroyed by the condition that the policy shall not apply to any disease resulting from an injury or another disease. An injury to a physician by the breaking of a bottle from which he is attempting to secure medicine for a patient is held, in Central Acci. Ins. Co. v. Rembe (Ill.), 5 L. R. A. (N.S.) 933, to be within the terms of a clause of an accident-insurance policy making the insurer liable for septic wounds caused by accident while performing an operation pertaining to the business of the insured.

Railway.—A boy who finds a street crossing blocked by a railway train is held, in Hastings v. Southern R. Co. (C.C.A. 4th C.), 5 L. R. A. (N.S.) 775, to become a trespasser in entering upon the railway property for the purpose of getting around the train; and the company is held not to be liable for his death by the violent propulsion of cars against one which he has mounted for the purpose of crossing, unless it is guilty of wantonness or wilfulness.

Sale of Goods.—Recovery by a merchant of damages for delivery of a consignment of merchandise of a quality inferior to that contracted for is held, in Ellison v. Johnson (S.C.), 5 L. R. A. (N.S.) 1151, not to be prevented by the fact that, because of an advance in the market price, it is disposed of at a profit.

Street Railway.—The driver of a four-horse team attached to a loaded van so constructed that from the driver's seat he cannot look behind the van, is held, in Williamson v. Old Colony Street R. Co. (Mass.), 5 L.R.A. (N.S.) 1081, to have a right, in attempting to cross street car tracks, to act on the supposition that a motorman coming from behind will give him time to cross the tracks after he has started to do so.

Will.—A condition attached to a bequest, requiring the beneficiary to attend a certain church, is held, in Re Paulson's Will (Wis.), 5 L. R. A. (N.S.) 804, not to be invalidated by a constitutional provision giving every one the right to worship God according to the dictates of his own conscience, and providing that he shall not be compelled to attend any place of worship against his consent.

Judicial Promotions and Appointments in England.

The promotion of the Master of the Rolls to the vacancy created in the House of Lords by the death of Lord Davey, and the appointment of Lord Justice Cozens-Hardy and Mr. Justice Kennedy to be Master of the Rolls and Lord Justice respectively, are (says the London *Law Times*) excellent in

every way. The same can be said of the elevation of Mr. Pickford, K.C., as the King's Bench Division will undoubtedly be strengthened by this addition to its ranks. Lord Loreburn is to be congratulated upon his selections, and it is to be hoped that, during his tenure of office, promotion to the Bench will be rather the reward of merit than remuneration for political services.

Sir Richard Henn Collins, who succeeds the late Lord Davey as a Lord of Appeal in Ordinary, has been Master of the Rolls since 1901. Born in 1842, the son of Mr. Stephen Collins, Q.C., of Dublin, he was educated at Trinity College, Dublin, and afterwards at Downing College, Cambridge, where he had a distinguished career, being bracketed fourth classic in 1865 and elected to a fellowship. Two years later he was called to the Bar by the Middle Temple. He took silk in 1883, was appointed a Judge of the High Court in 1891, and Lord Justice of Appeal in 1897. Sir Richard was an arbitrator on the Venezuela boundary question in 1897.

Lord Justice Cozens-Hardy, who now becomes Master of the Rolls, is the second son of Mr. William Hardy Cozens-Hardy. He received his education at Amersham School and University College, London. He is a Bencher of Lincoln's-inn and has been chairman of the General Council of the Bar. He was a Judge of the Chancery Division from 1899 to 1901, when he was made a Lord Justice of Appeal. From 1885-99 he represented North Norfolk in the House of Commons in the Liberal interest. He was born in 1838.

Sir William Rann Kennedy, the new Lord Justice in the Court of Appeal, was born in 1846, the eldest son of the Rev. William James Kennedy, vicar of Barnwood. From Eton he proceeded to King's College, Cambridge, of which foundation he was successively scholar and fellow. His honours at Cambridge included the Bell and Craven scholarships, Sir William Browne's medal for epigrams (in 1865 and 1867), and the Powis medal. He was senior classic in

1868, the first class in that year also including the names of Mr. (afterwards Professor) Wilkins and Lord Edmond Fitzmaurice (now Lord Fitzmaurice). Sir William was called to the Bar by Lincoln's-inn in 1871, and took silk in 1885. A Liberal in politics and a follower of Mr. Gladstone, he contested Birkenhead twice, in 1885 and 1886, and St. Helens in 1892, but did not succeed in entering the House. He was for some years a member of the Bar Committee, and has been a Judge of the High Court since 1892. Sir William married, in 1874, Cecilia Sarah, daughter of Mr. George Richmond, R.A.

Mr. Justice Pickford is the second son of Mr. T. E. Pickford of Manchester, and is in his fifty-eighth year. After being called by the Inner Temple in 1874 he practised for some years in Liverpool before coming to London. He was appointed a Queen's Counsel in 1893, and was leader of the Northern Circuit for some years, but he has for some time past ceased to go on circuit owing to his increasing business in London, more particularly in Admiralty and commercial cases. Mr. Pickford was Recorder of Liverpool from 1904, before which he was Recorder of Oldham.

BOOK NOTICES.

Dos Passos's "The American Lawyer—As he was—As he is—As he can be." By John R. Dos Passos, of the New York Bar, Author of "The Law of Stock Brokers and Stock Exchanges," and other works. New York: The Banks Law Publishing Co.: 1907.

"It is assumed," begins the learned author, "that what the people of the United States really think or want, as citizens, is expressed through the ballot box. In the interim of these official utterances, public thought is reflected, and more or less created, by the four great organs of public opinion—the Pulpit, the Press, the Bar, and the Stage." Upon the mission of the Bar and how it is fulfilled Mr. Dos Passos discusses shrewdly and pleasantly. His ideals are high, and he is not without a cheerful optimism as to their attainment. Our readers are assured that they will enjoy this book.

Merlin's Interpleader:—The Law and Practice of Interpleader in the High Court and County Courts, with a Chapter on the Conduct of an Interpleader Proceeding, and a Complete Appendix of Forms, Statutes, and Rules. By S. P. J. Merlin, of Gray's Inn and the South Wales Circuit, Barrister-at-law. London: Butterworth & Co.: 1907.

In this book an attempt has been made to bring within the compass of one volume all the law now in force relating to interpleader in the High Court and County Courts in England; it has been written with the view of assisting the practitioner while engaged in the conduct of an interpleader matter. Concise, clear, and practical, it is a good example of what a short legal treatise ought to be; and it will, we think, be useful to the lawyer in every province of Canada.

Smith's Master and Servant:—A Treatise on the Law of Master and Servant, including therein Masters and Workmen in every Description of Trade and Occupation, with an Appendix of Statutes. By Charles Manley Smith, of the Inner Temple, Barrister-at-law. The 6th Edition, by Ernest Manley Smith, of the Inner Temple and Midland Circuit, Barrister-at-law; with Notes on the Canadian Law, by A. C. Forster Boulton, M.P., of the Inner Temple, South-Eastern Circuit, and Osgoode Hall, Barrister-at-law. London: Sweet and Maxwell. Toronto: The Carswell Co.: 1906.

This book has of course an established reputation, and little need be said about it. The 5th edition was issued as lately as 1902, but there has been a considerable accretion of statute and case law since that year, quite justifying a new issue. The Canadian notes by Mr. Forster Boulton, one of the Canadians in the Imperial House of Commons, are a prominent feature of the book, and certainly add much to its value. So far as we have been able to test them, they exhaust the Canadian case-law on the subject, and the references to the cases—really digests very often—are full and accurate. The method of citation is not what we are accustomed to, but it is perhaps as well to have a more than symbolic mode for English readers. Mr. E. M. Smith, in the preface, expresses the hope that the notes on Canadian law may be of assistance to those whose immediate interest is only in the law of England.

PERIODICALS AND PAMPHLETS.

The Banking System of Canada by Z. A. Lash, K.C., late counsel for the Canadian Bankers' Association. Mr. Lash, who is a Bencher of the Law Society of Upper Canada and Chairman of the Legal Education Committee, delivered a lecture on the above subject before the students of the third year in the Law School, Toronto, on the 1st February, 1907. It has now been printed in pamphlet form; older readers will find it both instructive and interesting.

A Sadistic Murder by Arthur MacDonald, Washington, D.C., Honorary President of the Third International Congress of Criminal Anthropology of Europe. In this pamphlet the author explains the theory of sadistic crime, and pledges his belief that an apparently motiveless murder was really due to a perverted sexual impulse.

South African Law Journal (15th February, 1907):—"The Late Sydney H. Barber" (with portrait); "The Serum or Precipitin Test for Blood, its Forensic Aspect," by P. C. Gane; "Notes on the History and Development of the Roman-Dutch Law" (concluded), by J. W. W.; "When may a Lessee Quit Possession during Subsistence of Lease?" "Contempt of Court;" "The Chinese Labour Ordinance (Transvaal) in its Constitutional Aspect," by Manfred Nathan. (Index and Annual Digest of vol. 23, 1906.)

Canadian Law Review (April, 1907):—"In and Out of Court," by Charles Morse; "The Doctrine of Common Employment in England and Canada," by J. P. MacGregor.

Criminal Law Journal of India (Lahore, 28th February and 15th March, 1907):—"The Modern Conception of Animus," by Brooks Adams; "The Lawyer's Patron Saint," by

Lewis M. Miller; "Privileged Communications between Attorney and Client;" "Compounding of Criminal Cases."

Case and Comment (Rochester, N.Y., March, 1907):— "Apportioning Waters of International River;" "Legislative Power to License Saloons;" "Must Federal Courts Follow Local Decisions as to Effect of State Statutes upon Servant's Assumption of Risks?" "Servant's Liability to Strangers for Nonfeasance."

American Law Review (St. Louis, Mo., March-April, 1907):—"Defects of the Armstrong Committee's Legislation relating to the Dividends of Mutual Life Insurance Policy Holders," by Samuel B. Clarke, New York; "An Analysis of the Legal Value of a Labour Union Contract," by Frank W. Grinnell, Boston; "The Executive Control of the Legislature," by James D. Barnett, University of Oklahoma; "Acquisition and Government of National Domain," by David K. Watson, Columbus, Ohio; "The True Remedy for Lynch-Law," by Hannis Taylor.

Albany Law Journal (March, 1907): — "Prospective Changes in the British Parliamentary System," by Edwin Maxey, University of Nebraska; "A Novel Order for Goods," by A. Bierbower; "After-thoughts on the Kingston Incident," by Edwin Maxey.

Columbia Law Review (April, 1907):—"Conspiracy as a Crime and as a Tort," by Francis M. Burdick; "Appellate Jurisdiction," by Everett P. Wheeler; "A Historical Sketch of Mohammedan Jurisprudence," by Abdur Rahim.

Harvard Law Review (April, 1907):—"Crucial Issues in Labour Litigation," III., by Jeremiah Smith; "Collateral Attack on Incorporation — (A) De Facto Corporations," by Edward H. Warren.

Green Bag (Boston, March, April, 1907) :—"James Wilson, Nation-Builder," by Lucien Hugh Alexander; "Monopoly and the Law," by Frank B. Kellogg; "The Imprisonment of Criminal Corporations," by Donald R. Richberg; "Little Journeys to the Legal Profession—The Importance of Mental Attitude," by Stanley E. Bowdle; "Methods of Ascertaining Cost of Carriage," by John B. Daish; "Squire Attom's Decisions," by Herbert J. Adams; "Frederic William Maitland," by Gaillard Thomas Lapsley; "The Will of an English Gentleman of Moderate Fortune," by Albert Martin Kales; "The New Criminal Courts," by Godfrey Pinkerton; "The Opening of the Central Criminal Court," by Percy A. Atherton; "Should Female Murderers be Hanged?" by Maynard Shipley; "The Growth of Mining Law," by R. L. McWilliams.

Michigan Law Review (Ann Arbor, March, April, 1907) :—"Thomas McIntyre Cooley," by Jerome C. Knowlton; "The Japanese School Incident at San Francisco from the Point of View of International and Constitutional Law," by Theodore P. Ion; "The Opportunities and Responsibilities of American Law Schools," by Floy R. Mechem; "Benjamin Franklin Graves," by Hoyt Post; "The Commerce Clause of the Federal Constitution and Two Recent Cases Dealing with it," by S. S. Gregory; "Some Suggested Changes in the Constitution of Michigan," by John A. Fairlie.

General Digest American and English (Monthly Advance Sheets, No. 57, February, 1907.)

Federal Reporter (National Reporter System, St. Paul, Minn., 14th February, 21st, 28th March, 4th, 11th April, 1907.)

Law Journal (London, Eng., 6th, 13th April, 1907.)

Law Students' Journal (London, Eng., March, 1907.)

Chicago Legal News (16th, 23rd, 30th March, 6th, 13th April, 1907.)

Chicago Law Journal (8th, 15th, 22nd, 29th March, 5th April, 1907.)

Central Law Journal (St. Louis, Mo., 29th March, 5th, 12th April, 1907.)

Law Notes (Northport, N.Y., April, 1907.)

Law Student's Helper (Detroit, Mich., March, 1907.)

Law Register (Chicago, 29th March, 1907.)

Madras Law Times (8th, 15th, 22nd February, 1st, 8th, 15th March, 1907.)

Punjab Law Reporter (Lahore, January, 1907.)

Civil Law Notes (Parvatipur, December, 1906.)

Punjab Law Reporter (Lahore, December, 1906.)

Kathiawar Law Reports (February, March, 1907.)

Madras Law Journal (31st January, 1907.)

Calcutta Weekly Notes (11th, 18th, 25th February, 4th, 11th, 18th March, 1907, and Digest of vol. 10.)

OCCASIONAL NOTES.

Supreme Court of Canada.

EXCHEQUER COURT.] [2ND APRIL, 1907.

COPELAND-CHATTERSON CO. v. PAQUETTE.

Patent of invention—Infringement—Want of novelty—New and beneficial results—Subject matter of invention—Purchase of patented device—Estoppel.

The plaintiffs were patentees of an alleged device intended to cheapen and simplify former methods of keeping and rendering statements of accounts by merchants and others, as was claimed, by providing for making entries and invoices by one and the same act, on manifolding sheets so folded as to occupy the entire platen of standard typewriters, and, at the same time, without waste, to provide a binding margin for the leaf with the book-keeping entry to utilize it as a page in a permanently bound book. The sheets manufactured and sold by the plaintiffs accomplished these ends through being folded so as to form two or three leaves, as required, with two-leaf sheets, the upper leaf forming an original or invoice and the lower sheet the duplicate and book-keeping entry; with three-leaf sheets, the third leaf serving either as a duplicate or to be used as an original duplicated on the reverse side of the centre leaf. In each case the leaves are connected together so as to form one integral sheet with vertical and transverse score lines enabling the invoices, etc., to be easily detached, leaving the permanently retained page and folded margin with perforations to fit binders. The specifications of the patented device succinctly described and illustrated various forms of folding the sheets to secure its advantages. An action for infringement by the defendants manufacturing and selling

sheets similar to the above described device was dismissed in the Exchequer Court.

Held, affirming the judgment appealed from, that there was neither subject matter nor novelty in the device claimed as an invention, and consequently that it was not patentable.

W. E. Raney, for the appellants.

Mignault, K.C., and *Perron*, K.C., for the respondent.

EXCHEQUER COURT.] [2ND APRIL, 1907.

THE "WANDRIAN" v. HATFIELD.

Ship—Collision—Negligence—Tug and tow—Negligence of tug.

A tug with the ship "Wandrian" in tow left a wharf at Parrsboro', N.S., to proceed down the river to sea. The schooner "Helen M." was at anchor in the channel, and the tug directed its course so as to pass her on the port side, when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M.," changed her course without giving any signal, and tried to cross her bow to pass down on the starboard side, and in doing so the "Wandrian" struck her, inflicting serious injury. In an action against the "Wandrian" by the owners of the "Helen M.," the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local Judge found as a fact that she was on the eastern side.

Held, affirming the judgment of the local Judge, that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel, as found by the Judge, there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel, she could easily have been passed to starboard; and that in attempting to cross over and pass to starboard, when she was so near the "Helen M." as to render a collision almost inevitable, was negligence on the

tug's part, and that the "Helen M." exercised proper vigilance and was not negligent in failing to lengthen her anchor chains, as the "Wandrian" was too close and had not signalled.

Held, also, that the tow was liable for such negligence in the navigation of the tug.

Coster, K.C., for the appellants.

McLean, K.C., for the respondent.

ONTARIO.] [19TH MARCH, 1907.

JAMES BAY R. W. CO. v. ARMSTRONG.

Appeal—Railway Act—Expropriation—Appeal from award—Choice of forum.

By s. 168 of 3 Edw. VII. c. 58, amending the Railway Act, 1903 (s. 209 of the present Act), if an award by arbitrators on expropriation of land by a railway company exceeds $600, any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R. S. C. 1906 c. 1, s. 34, s.-s. 26).

Held, that, if an appeal from an award is taken to the High Court, there can be no further appeal to the Supreme Court of Canada, which cannot even give special leave.

Appeal from the decision of MEREDITH, C.J., in Re Armstrong and James Bay R. W. Co., 12 O. L. R. 137, 7 O. W. R. 713, quashed.

E. D. Armour, K.C., and *R. B. Henderson*, for the appellants.

E. E. A. DuVernet and *J. Kyles*, for the respondent.

ONTARIO.] [2ND APRIL, 1907.

ROBINSON v. McGILLIVRAY.

Appeal—Amount in controversy—Creditor's action—Transfer of cheque.

R., on behalf of himself and all other creditors of McG., brought an action for a declaration that the transfer of a

cheque for $1,025 by McG. to S. was preferential and void, and to recover the proceeds of the cheque for distribution among the creditors. The judgment of the High Court, 12 O. L. R. 91, 7 O. W. R. 438, affirmed by the Court of Appeal, 13 O. L. R. 232, 8 O. W. R. 602, dismissed the action.

Held, that the only matter in controversy was the property in the sum represented by the cheque, and such sum being more than $1,000, an appeal would lie.

Motion to quash dismissed.

G. F. Shepley, K.C., for the respondents.

F. H. Chrysler, K.C., for the appellants.

QUEBEC.] [13TH MARCH, 1907.

MONTREAL STREET R. W. CO. v. MONTREAL CONSTRUCTION CO.

Contract—Sale of securities—Interpretation of contract—Arts. 1018, 1019, C.C.—Railway—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement.

The plaintiffs sold the defendants stocks and bonds of the P. and I. R. Co., with an agreement in writing, which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000, in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. and I. R. Co., except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows: "After two years from the date thereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle, and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years

or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option, and paid the $30,000 to the vendors, who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement, was subsequently settled by the vendors within the two years. The question arose as to whether or not this existing claim and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement.

Held, affirming the judgment appealed from, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that the last clause was not inconsistent with the previous clauses of the agreement; and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause.

Hague, for the appellants.

Dandurand, K.C., for the respondents.

QUEBEC.] [2ND APRIL, 1907.

MAYRAND v. DUSSAULT.

Will—Testamentary capacity—Undue influence—Fraud and artifice—Improper suggestion—Captation—Importunity—Deception by beneficiary—Nullity of donation—Concurrent findings of fact—Reversal on appeal—Practice—Revocation of former will—Onus of proof.

The promoter of a will by which he takes a benefit is obliged to produce evidence clearly shewing that, in making

the will, the testator acted without improper suggestion or undue influence in the revocation of a former will.

Shortly after his marriage, the testator and his wife made their wills, respectively, by which they each constituted the other general residuary legatee. A short time before the death of the testator from a wasting disease, the defendant took advantage of the testator's weakness, and by artifices and improper suggestions so influenced him as to secretly procure the execution of another will by which the former will was revoked and the defendant was given the bulk of the testator's estate.

Held, reversing the judgment appealed from, that, under the circumstances, the insidious methods persistently made use of by the defendant amounted to captation and undue influence, and that, in the absence of clear proof that the testator was not deceived and misled thereby, the will should be annulled.

As there were concurrent findings by the Courts below against the contention that the testator was of unsound mind at the time of the execution of the second will, the Supreme Court of Canada refused to interfere on that ground.

Bisaillon, K.C., for the appellant.

Mignault, K.C., and *Bonin*, K.C., for the respondent.

NEW BRUNSWICK.] [13TH MARCH. 1907.

CARLETON WOOLLEN CO v. TOWN OF WOODSTOCK.

Municipal corporation—Exemption from taxes—Resolution of council—Discrimination—Establishment of industry—36 V. c. 81, s. 1 (N.B.)

By s. 1 of 36 V. c. 81, the New Brunswick legislature authorized the town council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years, by a

resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woollen mill in the town of Woodstock be exempted from taxation for a period of ten years."

Held, per DAVIES, IDINGTON, and MACLENNAN, JJ., that this resolution provided for discrimination in favour of companies and against individuals who might establish a woollen mill or mills in the town, and was therefore void.

City of Hamilton v. *Hamilton Brewing Association,* 38 S. C. R. 239, followed.

Held, per DAVIES, J., that the resolution exempting any company, and not any property of a company, was too indefinite and uncertain to found an exemption upon.

In 1893 a woollen mill was established in Woodstock by the Woodstock Woollen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution, and two months later the Carleton Woollen Mills Co. (appellants) were incorporated, and acquired the mill from the purchaser at the sheriff's sale, and had operated it since.

Held, that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woollen mill," without shewing that when it was acquired it had ceased to exist as such, which they had not done.

Carvell, for the appellants.

Vince and *Hartley,* for the respondents.

NEW BRUNSWICK.] [21ST MARCH, 1907.

IN RE RICHARD.

Canada Temperance Act—Conviction—"Criminal case"—R.S.C. c. 135, s. 32—Penalty "not less than $50" - Habeas corpus—Judge in Chambers—Reference to Court.

A commitment on conviction for an offence against part II. of the Canada Temperance Act is "a commitment in a

criminal case," under s. 32 of R. S. C. c. 135 (R. S. C. 1906 c. 139, s. 62), which gives a Judge of the Supreme Court of Canada power to issue a writ of habeas corpus.

By 4 Edw. VII. c. 41 (R. S. C. 1906 c. 152, s. 127) for a first offence against part II. of the Canada Temperance Act a fine may be imposed of "not less than $50" and for a second offence of "not less than $100."

Held, that for a first offence the justices cannot impose a fine of more than $50; MACLENNAN, J., dissenting.

On application to a Judge for a writ of *habeas corpus*, he may refer the same to the Court, which has jurisdiction to hear and dispose of it; IDINGTON and MACLENNAN, JJ., dissenting.

Prisoner discharged.

Masters, K.C., and *C. Lionel Hanington*, for the applicant.

J. A. Ritchie, contra.

Exchequer Court of Canada.

[BURBIDGE, J., 18TH MARCH, 1907.

DOMINION OF CANADA v. PROVINCE OF ONTARIO.

Constitutional law—Indian lands—Treaty with Indians—Surrender—Disputed territory—Lands bargained for by Dominion forming part of province—Liability of province to contribute to payments made to Indians.

Action for an order or declaration that the province of Ontario was under an obligation to reimburse or repay to the Dominion certain large sums of money paid to the Salteaux Tribe of the Ojibeway Indians, under the North-West Angle Treaty No. 3, for the purpose of obtaining a surrender of the Indian title in certain lands subsequently declared to form part of the province of Ontario.

W. D. Hogg, K.C., *E. L. Newcombe*, K.C., and *Roy*, for the Dominion of Canada.

Sir *Æmilius Irving*, K.C., *C. H. Ritchie*, K.C., *G. F. Shepley*, K.C., and *H. S. White*, for the Province of Ontario.

BURBIDGE, J.:—The principal controversy between the parties to this action is as to whether or not the province of Ontario is liable to repay to the Dominion of Canada any portion of the moneys that have been expended by the Dominion in fulfilment of the obligations created by a treaty which is known as the North-West Angle Treaty No. 3; and which was made and concluded on the 3rd October, 1873, between Her late Majesty the Queen and the Salteaux Tribe of the Ojibeway Indians, respecting a tract of land, the boundaries of which are given in the Treaty, and which may in general terms be described as covering the area from the watershed of Lake Superior to the North-West Angle of the Lake of the Woods, and from the boundary of the United States of America to the height of land from which the streams flow towards the Hudson Bay, and containing about 55,000 square miles. There is also a counterclaim, to which reference will be made later; but the main question at issue between the parties is that which has been stated.

By s. 146 of the British North America Act, 1867, provision was made for the admission into the Union of the provinces thereby united, of Newfoundland, Prince Edward Island, and British Columbia, and also of Rupert's Land and the North-West Territory; and it was thereby enacted that the provisions of any order in council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland. By the Act of that Parliament, known as the "Rupert's Land Act, 1868," 31 & 32 V. c. 105, provision was made for the surrender to the Crown, and for the extinguishment thereby, of the Hudson's Bay Company's rights in Rupert's Land, which for the purposes of this Act was defined to include the whole of the lands and territories held, or claimed to be held, by that company. That Act also gave Her late Majesty authority to declare that Rupert's Land should be admitted into and become part of the Dominion of Canada. In 1869 the

Parliament of Canada, in view of the probability that Her Majesty the Queen might, pursuant to the British North America Act, 1867, be pleased to admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, before the then next session of the Parliament of Canada, passed an Act to make temporary provision for the civil government of such territories until more permanent arrangements could be made by the government and Parliament of Canada. That Act was amended and continued by an Act of the Parliament of Canada, 33 V. c. 3, which was assented to on the 12th May, 1870, and which, among other things, provided that on, from, and after the day upon which the Queen should by order in council in that behalf admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, there should be formed out of the same a province, which should be one of the provinces of the Dominion of Canada, and which should be called the province of Manitoba, and should be bounded as therein described: 33 V. c. 3, s. 1. The two Acts mentioned, that is, the Act 32 & 33 V. c. 3, and the Act 33 V. c. 3, were by an Act of the Parliament of the United Kingdom, passed in the year 1871, respecting the establishment of provinces in the Dominion of Canada, declared to have been valid and effectual for all purposes whatever from the date at which they respectively received the assent in the Queen's name of the Governor-General of the Dominion of Canada: British North America Act, 1871, s. 5. The order in council admitting Rupert's Land and the North-West Territory into the Union was passed on the 23rd June, 1870, and they thereby from the 15th July in that year became a part of the Dominion. That extended the boundaries of the Dominion westerly and northerly from the boundaries of the old province of Canada. But at that time the boundaries of the old province of Canada had not been definitely determined, and a dispute arose between the province of Ontario on the one hand and the Dominion on the other as to what the true boundaries were.

With respect to the Indian title to the territories which were united to the Dominion by the Queen's order of the 23rd June, 1870, it was provided in the 14th paragraph of the terms of Union that any claims of Indians to compensation for lands required for purposes of settlement should be disposed of by the Canadian government in connection with the Imperial government, and that the Hudson's Bay Company should be relieved of all responsibility in respect thereof. By the Lake Superior Treaty, 1850, made on the 7th September of that year, the Ojibeway Indians, inhabiting the northern shore of Lake Superior in the province of Canada from Batchewanaung bay to Pigeon river at the western extremity of the said lake and inland throughout that extent to the height of land which separates the territory covered by the charter of the Hudson's Bay Company from the said tract, had surrendered to Her late Majesty their title and interest in the tract of land described in the Treaty. The Indian title in the territories to the west and north of this tract of land had never been surrendered. So far as such territories were within the true boundaries of the old province of Canada, all the lands, mines, minerals, and royalties therein which belonged to such province at the date of the Union of the provinces of Canada, Nova Scotia, and New Brunswick, became the property of the province of Ontario by virtue of s. 109 of the British North America Act, 1867, subject, however, to any interest other than that of the province in the same. There was, however, no change of title in respect of these lands. Both before and after the Union the Crown had a "present proprietary estate in the land, upon which the Indian title was a mere burden." By s. 109 of the Act of Union the province of Ontario acquired the right, subject to that burden, to administer these lands and to take the revenues arising therefrom. That was determined in the *St. Catharines Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46. In that case Lord Watson, delivering the judgment of their Lordships of the Judicial Committee of the Privy Council, and dealing with the territory in respect of

which the questions to be determined in this case arise, put the matter in this way: "Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the Treaty of 1873, *Attorney-General for Ontario* v. *Mercer*, 8 App. Cas. 767, might have been an authority for holding that the province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the Union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land upon which the Indian title was a mere burden. The ceded territory was at the time of the Union land vested in the Crown, subject to 'an interest other than that of the province in the same,' within the meaning of s. 109, and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed."

It is also to be observed that the admission in 1870 of Rupert's Land and the North-Western Territory into the Union did not work any change in the title to the public lands therein. These remained in the Crown, but the Dominion of Canada thereby acquired the right to administer such lands, and to take the revenues which accrued therefrom. It has been seen that it was one of the terms of that Union that the Canadian government should, in communication with the Imperial government, dispose of any claims of Indians to compensation for lands required for the purposes of settlement. But that equally would have been necessary as an act of administration on the part of the Canadian Government, if there had been no express stipulation. It had been the well settled policy of the Crown in the administration of lands inhabited by Indians, not to open up such lands to settlement without first obtaining a surrender of the Indian title.

The question of obtaining the surrender of the Indian title in the lands described in the North-West Angle Treaty, No. 3, was in 1870, when Rupert's Land and the North-

Western Territory were admitted to the Union, a very urgent and pressing one, not because such lands were at that time required or deemed to be desirable or available for settlement, but because it was necessary for the good government of the country to open up and maintain through such lands a line or way of communication between the eastern and settled portions of Canada, and the great and fertile western territory that was added to the Dominion, At that time a line of communication, known as the Dawson route, was being opened up through such lands. During the summer of that year it became necessary to send through this territory a military force to maintain the Queen's authority and establish order in the country about the Red river. Early in the year the government of Canada had sent an agent to Fort Frances "to keep up a friendly intercourse" with the Chiefs and Indians who assembled there, and to "disabuse their minds of any idle reports they might hear as to the views and intentions of the government of Canada in reference to them." In May the government sent Mr. Simpson to the same place to secure from the Salteaux Indians a right of way for the troops, and to prevent any interruption of surveying parties during the summer. The demands that the Indians made were considered so excessive that Mr. Simpson did not come to any agreement with them. They, however, stated that it was not their intention to try and stop the troops from passing through their lands on their way to the Red river, but that, if Mr. Dawson was to make roads through their country, they expected to be paid for the right of way. In the next year another attempt was made to arrive at a settlement with these Indians. But on this occasion it was not a question of obtaining merely a right of way through their lands, but of acquiring a surrender of the Indian title therein so that such lands would be open for settlement. By a commission issued under the Great Seal of Canada, and bearing the date the 27th April, 1871, and in which it was recited that the Indian title in the lands therein mentioned

had not been extinguished, and that such lands were required for settlement, Her late Majesty appointed Mr. Simpson, Mr. Dawson, and Mr. Pitcher, commissioners to make a treaty with the several bands of the Ojibeway Tribe of Indians occupying and claiming the lands in that portion of her North-Western Territory lying and being between Lake Shebandowan and the north-west angle of the Lake of the Woods. The commissioners, as appears from their report of the 11th July, 1871, entered into negotiations with the Indians, and settled, as they thought, "all past claims" that the Indians had, but "various causes prevented them from entering into a formal and permanent arrangement" with the Indians at that time. On the 20th July, 1871, by an order in council passed on the 16th May in that year, British Columbia was admitted into the Union. By the terms of the Union the government of Canada, among other things, undertook to construct a railway "to connect the seaboard of British Columbia with the railway system of Canada." That involved the construction of a railway through the lands for the surrender of the Indian title in which the government of Canada was in that year negotiating. It afforded another reason, if another were needed, for an early extinguishment of such title. It is put forward on behalf of Ontario that the conclusion of a treaty with these Indians was a prime necessity in the carrying out of the railway policy necessary to implement the agreement of the Dominion with the province of British Columbia. That the construction of the Canadian Pacific Railway would in the course of time have made it necessary to extinguish the Indian title in these lands, or at least in so much thereof as was needed for a right of way through the same, cannot admit of doubt. But it is not at all clear that this matter was in 1871 pressing or urgent, if anything were thought to turn upon that point. But it is, it seems to me, clear that, for a number of reasons, either relating, or deemed by the government of Canada to relate, to the administration of the affairs of the Dominion, it was at the time necessary that the Indian title in these lands should

be extinguished. Those whose duty it was at the time to advise Her Majesty and His Excellency the Governor-General, in relation to the government of the Dominion, held the view that the Dominion had the right to administer the lands mentioned and to take any revenue to be derived therefrom. There was no question of extinguishing the Indian title in lands belonging to the province of Ontario. The lands were thought by the Dominion authorities to belong to the Dominion. So it happened that those whose duty it was to advise the Lieutenant-Governor of the province of Ontario in respect of the government and affairs of the province were not consulted, and had no part in the negotiations that resulted in the Treaty that was concluded in 1873.

It is not necessary for the moment to consider in detail the terms of that Treaty. That may more conveniently be done on another branch of the case. By the Treaty the Salteaux Tribe of the Ojibeway Indians surrendered their title in a tract of land embracing, as therein stated, an area of 55,000 square miles, more or less. Mr. Bray, the Chief Surveyor of the Department of Indian Affairs, who was examined as a witness, gives the total area covered by the treaty as 49,300 square miles. And of this area, having regard to the boundaries of the province of Ontario as they were ultimately determined to be, 30,500 square miles are in the province of Ontario, 13,600 square miles in the district of Keewatin, and 5,200 square miles in the province of Manitoba. The charges arising from the obligations incurred by the Crown under this Treaty have been defrayed out of moneys appropriated by the Parliament of Canada, and expended by or on behalf of the Dominion government. Particulars of such expenditure up to the year 1902, amounting, without interest, to something over $800,000, are given. On the other hand, the province of Ontario for the years 1874 to 1894, both inclusive, received from the sale of lands, minerals, and timber in that part of the province which was in the disputed territory, a sum exceeding $1,000,000. A part of the disputed territory was, however, for a number of years adminis-

tered by the Dominion government, in pursuance of an agreement for a conventional boundary for the province of Ontario made on the 26th June, 1874, between the Minister of the Interior of the Dominion and the Commissioner of Crown Lands of the province of Ontario on behalf of the governments of the Dominion and of Ontario, respectively. In that connection the Dominion authorities collected an amount which may approximately be stated at $150,000. That sum, the exact amount of which has not been ascertained, the province of Ontario claims from the Dominion by way of counterclaim in this action. The Dominion admits its liability to account for this amount, and, by consent, a reference was made to Mr. Cameron, the Registrar of the Supreme Court of Canada, to make an inquiry and to report as to the amount of the Dominion's liability in that behalf. The amounts collected by the Dominion, and the sums received by the province of Ontario, from the administration of the lands in which the Indian title was extinguished by the North-West Angle Treaty No. 3, represent the revenues that have been derived therefrom. The Dominion, on the one hand, has discharged the burden of the Indian title in such lands. The province of Ontario, on the other hand, has received or is entitled to an account for the revenues that have accrued from the administration of the larger portion of such lands. And the Dominion now asks that it be declared that the province of Ontario is liable to repay to the Dominion a proper proportion of the annuities and other moneys paid by the Dominion to and for the Indians under the terms and stipulations of the Treaty. To that demand the province of Ontario answers, in the first place, that it was no party to the Treaty; that the Dominion of Canada for its own purposes negotiated and entered into the same without any authority or mandate from the province, and is not entitled to claim any indemnity from the province in respect of the obligations thereby assumed.

The jurisdiction of this Court to hear and determine the question at issue is derived from statutes passed by the Par-

liament of Canada, and by the legislature of the province of Ontario, R. S. C. 1886 c. 135, s. 2, now R. S. C. 1906 c. 140, s. 32, and R. S. O. 1897 c. 49, which give the Court jurisdiction of controversies between the Dominion of Canada and the province. And as to that I agree with Mr. Shepley that the mere fact that there is a controversy does not give the Court authority to decide against the province simply because it should think that as a matter of good conscience and honourable dealing the province having derived a benefit from the Treaty, should relieve the Dominion from a proportionate part of the burden arising therefrom; that it is not simply a question of what the Court might think to be fair in the premises without regard to the principles of law applicable to the case. At the same time, as Mr. Newcombe pointed out, the question arises between governments, each of which, within its own sphere, exercises the authority of one and the same Crown. For that reason one cannot expect the analogies of the law as applied between subject and subject to be perfect or in every way adequate to the just determination of the case. Such distinctions must of course be kept in mind; and perhaps, for that reason, it may be convenient to refer to a few of the provisions of the British North America Act, 1867, which are so well known that otherwise it would be wholly unnecessary to make any reference to them. The executive government and authority of and over Canada is vested in the King of the United Kingdom of Great Britain and Ireland: British North America Act, 1867, ss. 9 and 2. The Governor-General is His Majesty's chief executive officer for carrying on the government of Canada in his name: ib., s. 10. In general he acts in respect of the government of Canada upon the advice of his Ministers, being members of the King's Privy Council for Canada: ib., s. 12. The executive authority of the Crown in respect to the government or affairs of a province is vested in the Lieutenant-Governor or administrator of the province acting with the advice or consent or in conjunction with the executive council of the province: ib., ss. 58-67. In each case it is the King's or the

Crown's authority that is exercised. But in respect of the government of Canada, the King's representative acts upon the advice of the Dominion Ministers; while in respect of provincial matters the Lieutenant-Governor acts upon the advice of the executive council of the province. With regard to the distribution of executive authority between the Governor-General of the Dominion and the Lieutenant-Governors of the several provinces, it will, I think, in general, be found that the former has executive authority in respect of matters over which the Parliament of Canada has legislative authority; while the latter have executive authority over matters which are within the legislative control of the legislatures of the several provinces.

In construing the British North America Act, 1867, it is necessary, as has often been pointed out by the highest authority, to distinguish between proprietary rights and legislative authority. The former does not follow the latter. But under that Act executive authority does, I think, in general follow legislative authority. There may be some exceptions, but I am not aware of any that in any measure affect this case. But, as it happens that a subject or matter which, in one aspect of a case, is within the legislative authority of the Parliament of Canada, may in another aspect of the case be within the legislative authority of a provincial legislature; so it may happen that while in one aspect of a matter, executive authority in respect thereof may be vested in the Governor-General, in some other aspect of the same matter it may fall within the executive authority and action of a Lieutenant-Governor of a province. By s. 91 of the British North America Act, 1867, class of subject No. 24, the Parliament of Canada has exclusive legislative authority to make laws for the peace, order, and good government of Canada in relation to Indians and lands reserved for Indians; and it cannot, I think, be doubted that, unless the Parliament of Canada otherwise declares, the executive authority of the Governor-General of Canada extends to all matters of administration relating to Indians

and to their lands and affairs. By s. 92 of the same Act, class of subject No. 5, the legislature of each province may exclusively make laws in relation to the management and sale of the public lands belonging to the province, and of the timber and wood thereon; and the executive authority exercisable in the administration of such lands is, unless the legislature otherwise enacts, vested in the Lieutenant-Governor acting by and with the advice of the executive council of the province.

The treaty, out of which the question in issue here arises, was concluded by commissioners appointed by the Queen, acting on the advice of her Ministers for the Dominion. There is no question as to its validity. In *St. Catharines Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 14, Lord Watson stated that they had full authority to accept a surrender to the Crown; but that they had no authority or power to take away from Ontario the interest which had been assigned to that province by the Imperial statute of 1867. There can, I think, be no doubt of their authority to bind the Crown to make the payments stipulated for in the Treaty. The case cited shews that the lands thereby surrendered were, or might fall, within the true construction of the words of s. 91 (24) of the Act of 1867, "lands reserved for the Indians:" 14 App. Cas. 59. And, that being the case, there can, I think, be no doubt as to the authority of the Crown, at the instance of the Dominion Ministers and upon their advice, to enter into this Treaty. The difficulty is that in one aspect of the matter they were, although it was not known at the time, dealing with the public lands belonging to the province of Ontario, and removing a burden therefrom. It is argued for the Dominion that Ontario must be taken to have acquiesced in what the Dominion authorities did in negotiating this treaty, and that the province is bound by such acquiescence. I am not able to accede to that contention, or to rest my judgment on that ground. The most that can be said on that branch of the case is, it seems to me, that while on the

one hand the government of Canada, holding, in good faith, but erroneously as it turned out, the view that all the lands to be surrendered belonged to the Dominion, did not consult the government of Ontario in respect of the negotiations with the Indians for the surrender of their title in such lands; on the other hand, the government of the province did not raise any objection to the matter so proceeding, and did not prefer any request to be represented in the negotiation of the treaty.

Now with regard to the contention that, inasmuch as a part of the benefit arising from the surrender of the lands mentioned in the treaty accrues to Ontario, that province should relieve the Dominion from a proportionate part of the obligations thereby created, it appears to me that that consideration is not of itself sufficient to make the province liable. If the province had had any option in the matter, if it had been open to it to accept or decline such benefit, and it had accepted it, then the province would have been liable for its fair proportion: *Leigh* v. *Dickeson,* 15 Q. B. D. 60. But that is not the case. The burden of the Indian title was removed from these lands before it was determined whether any part of them was within the province or not. When it was decided that a large portion of such lands was within the province of Ontario, there was nothing the province could do but accept the lands and administer them free from such burden. In *Ruabon Steamship Co.* v. *London Assurance Co.*, [1900] A. C. 6, one of the cases on which Mr. Shepley relied, it was held that there is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit therefrom. And that principle is, I think, as clearly applicable to the transactions of the Dominion and provincial governments as it is to those which occur between individuals. If the Parliament of Canada should appropriate, and the government of Canada should expend public moneys of the Dominion for Dominion purposes, with the result that a province was benefited, and there was no agreement with the

province or request from it, then it would be clear that the province was under no obligation to contribute to such expenditure, or to indemnify the Dominion against any part thereof. According to the contention of the province of Ontario, as I understand it, the present case falls within that proposition. Equally it seems clear that if the Parliament of Canada should appropriate and the government of Canada should expend the public moneys of the Dominion for a provincial purpose to the benefit of a province, there being no agreement with the province or request from it, no obligation would arise on the part of the province to contribute towards such expenditure or to reimburse the Dominion for any part thereof. The principle would apply as well to expenditures made by a province with the result that the Dominion as a whole was benefited. In all such cases the appropriation and expenditure would be voluntary, and no obligation to contribute would arise. But the present case appears to me to differ from those stated in some material respects.

At the time when the treaty was negotiated, the boundaries of the province were unsettled and uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That, of course, did not affect Ontario's title to such part of the lands claimed by the company as were actually within the province. But on the admission of Rupert's Land and the North-Western Territory into the Union, the government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed, but which was in fact within the province of Ontario, the Dominion government occupied a position analogous to that of a *bona fide* possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in these lands

could not with prudence be deferred until such boundaries were determined. It was necessary to the peace, order, and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion, and that they had a right to administer the same. In this they were in a large measure mistaken, but, no doubt, the view was held in good faith. They proceeded with the negotiation for the Treaty without consulting the province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection, and did not ask to be represented in such negotiation. The case bears some analogy to one in which a person, in consequence of unskilful survey, or in the belief that the land is his own, makes improvements on lands that are not his own. In such a case the statutes of the old province of Canada made, and those of the province of Ontario make, provision to protect him from loss in respect of such improvements, or to give him a lien therefor: 59 Geo. III. c. 14, s. 12; 12 V. c. 35, s. 49; C. S. U. C. c. 93, s. 53; R. S. O. 1877 c. 51, ss. 29 and 30; R. S. O. 1887 c. 100, ss. 31, 32; R. S. O. 1897 c. 119, ss. 31 and 32; 36 V. c. 22, s. 1 (O.); 40 V. c. 7 (O.), schedule No. 114; R. S. O. 1877 c. 95, s. 4; R. S. O. 1887 c. 100, s. 30; R. S. O. 1897 c. 119, s. 30; *Gummerson* v. *Banting*, 18 Gr. 516; *Carrick* v. *Smith*, 34 U. C. R. 399; *O'Connor* v. *Dunn*, 37 U. C. R. 430; *Fawcett* v. *Burwell*, 27 Gr. 445; *Beaty* v. *Shaw*, 14 A. R. 600. The case, however, appears to me to bear a closer analogy to one in which a *bona fide* possessor or purchaser of real estate pays money to discharge an existing incumbrance or charge upon the estate, having no notice of any infirmity in his title. In such a case, as stated by Mr. Justice Story in *Bright* v. *Boyd*, 1 Story's R. 497, 498, the possessor or purchaser was, according to the principles of the Roman law, entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him. And again, in the same case (2 Story's R. 607), Story, J., is reported as follows:

"I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law, and it has the most persuasive equity, and I may add common sense and common justice for its foundation. The Betterment Acts (as they are commonly called) of the States of Massachusetts and Maine, and of some other States, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate."

In *Gummerson* v. *Banting*, 18 Gr. 522, Mr. Chancellor Spragge stated that he entirely agreed with Mr. Justice Story that the principle cited from the Roman law had the most persuasive equity and common sense and justice for its foundation. In the latter case, the learned Chancellor held that the rule that a party in good faith making improvements on property which he has purchased, will not be disturbed in his possession, even if the title prove bad, without payment for his improvements, will be enforced as well where the purchaser is plaintiff as where he is defendant, and that although no action has been brought to dispossess him. This decision was the subject of some comment in *Beaty* v. *Shaw*, 14 A. R. 600, in the Court of Appeal for Ontario, where Burton, J.A., stated that he could find no case in Ontario before *Gummerson* v. *Banting*, and no case at all in England, where a stranger who has entered upon land, even under colour of title, can, as against the true owner, claim to be paid for his improvements. He states his view of the law in the following terms (p. 609): "No doubt, by the rules of the civil law, the possessor of the property of another who has made improvements in good

faith, believing himself to be the owner, was entitled to be paid for such improvements; and this law has been adopted by many countries whose laws are based upon the civil law; thus it has been acted upon in Scotland, and in some instances, but not universally, in America; but we do not derive our laws from that source; and I know of no instance in which, by the law of England, the principle has been adopted except in the action for mesne profits, where the party has been sometimes allowed to recoup himself by setting off the value of the improvements, and in cases where the legal title has been in the person making the improvements and the equitable title in another, who is obliged to resort to a court of equity for relief; and where the Court then acts upon the principle that the party who comes to court to seek equity must himself be willing to do what is equitable."

It appears, therefore, that, if the question in issue were to be determined by analogy to the law of the province of Ontario applicable to individuals, the province could not maintain its counterclaim for the moneys which the Dominion collected as revenue from the disputed territory, without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the charges incurred in extinguishing the burden of the Indian title; but that it is, to say the least, extremely doubtful if this equity could be enforced in an action by the Dominion against the province.

The question, however, does not rest there. In *St. Catharines Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 60, Lord Watson, dealing with this very question of the liability of the province to contribute to the Dominion in respect of the charges mentioned, said: "Seeing that the benefit of the surrender accrues to her, Ontario must of course relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by her Majesty, and which are said to have been in part fulfilled by the Dominion government." The Domin-

ion relies strongly upon this expression of their Lordships' views as conclusive of the question at issue. On the other hand, for the province it is argued that the opinion expressed is obiter, that it formed no part of the judgment in that case, and that the facts proved in this case differ materially from those that were before their Lordships in the case referred to. So far as the questions in this case relate to the extent to which the province is liable to contribute to the expenses incurred by the Crown in fulfilment of the obligations created by the Treaty, this case no doubt differs materially from the *St. Catharines Milling and Lumber Co.'s* case. But with respect to the principal question at issue, namely, whether the province is liable to contribute anything, this case presents, I think, no new fact or aspect. The province's main defence here is that it was not a party to the treaty. In the case for the appellants in the *St. Catharines Milling and Lumber Co.'s* case, paragraph 6, it was stated that neither the Lieutenant-Governor of Ontario, nor the province of Ontario, were parties to the treaty. And in the 21st paragraph of the case of the respondent, the ground was taken that the province, not having been a party to the treaty, was not bound by it. With regard to the formal judgment in the case last referred to, it is to be observed that it was entered up between the original parties to the action on consideration of the question as to whether the judgment of the Supreme Court of Canada ought to be affirmed or not. By the order which gave the appellants leave to bring the judgment of that Court under review, Her Majesty was pleased to direct that the government of the Dominion should be at liberty to intervene in the appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses (14 App. Cas. 53), with the result that between the Dominion and the province there was no formal judgment of the questions at issue between them. It was, however, determined that the ceded territory within the province of Ontario belonged to the province.

subject to "an interest other than that of the province in the same;" that is, that it was subject to the burden of the Indian title that the Crown upon the advice of its Dominion Ministers extinguished; and that, as the benefit of that surrender accrued to the province, it must relieve the Crown and the Dominion of the obligations involving the payment of money which were undertaken by her Majesty and fulfilled by the Dominion government. In the *St. Catharines Milling and Lumber Co.'s* case, the province of Ontario stood in the position of a plaintiff; and as between the province and the Dominion the views of their Lordships as to the province's liability to indemnify the Dominion may, I think, with fairness, be taken as a part or condition of the judgment in favour of the province, although such views found no place in the formal judgment pronounced. But, however that may be, it is, I think, proper that this Court should give effect to the view that their Lordships expressed. I therefore answer in the affirmative the question as to whether the province of Ontario is liable to indemnify the Dominion against any portion of the expenditure incurred in discharge of the obligations created by the North-West Angle Treaty No. 3.

The obligations involving the payment of money which the Crown incurred by this Treaty, and which have been discharged by the government of Canada, are as follows:—

First, with a view of shewing her satisfaction with the behaviour and good conduct of her Indians, and in extinguishment of all claims theretofore preferred, Her Majesty, through her commissioners, made them a present of $12 for each man, woman, and child belonging to the bands represented.

Secondly, Her Majesty agreed to maintain schools for instruction in such reserves as to the government of Canada might seem advisable, whenever the Indians of the reserves should desire it.

Thirdly, Her Majesty agreed that no intoxicating liquor should be sold on any reserve, until otherwise determined

by the government of Canada; and that laws to protect the Indians from the evil influence of the use of intoxicating liquors should be strictly enforced.

Fourthly, that each Indian person inhabiting the tract surrendered should be paid by Her Majesty the sum of $5 yearly.

Fifthly, that the sum of $1,500 per annum should be expended yearly by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians.

Sixthly, Her Majesty agreed to supply to the Indians certain articles and animals to assist them in their work and for the encouragement of the practice of agriculture among them.

Seventhly, Her Majesty agreed that each duly recognized Chief should be paid a salary of $25 per annum, and each subordinate officer, not exceeding three for each band, should be paid $15 per annum, and that each Chief and subordinate officer should also receive once in every three years a suitable suit of clothing; also that each Chief should receive in recognition of the closing of the Treaty a suitable flag and medal.

Omitting interest, the following is a brief summary of the claim made by the Dominion against the province for moneys expended under the Treaty down to the year 1902:—

For annuities paid	$465,376 00
For cattle	17,344 08
For farming implements	6,724 53
For tools	3,301 99
For ammunition and twine	43,500 00
For clothing	23,285 37
For schools	84,221 64
For seeds	8,616 06
For provisions and presents supplied at the treaty negotiations and at the first payment of annuities	21,296 96
For surveys	25,242 53

For salaries to agents	$ 78,886 10
For agents' travelling expenses	35,409 62
For office rent	9,984 99
For suppression of the liquor traffic	6,206 96
	$829,396 83

Now, it is to be observed that whatever moneys have been expended under this Treaty by the Dominion government have been expended in respect of the Indians inhabiting a tract of land part of which only is within the province of Ontario, and it is suggested by Mr. Newcombe for the Dominion that the province should contribute to such expenditure in the proportion that the area of the surrendered territory within the province bears to the whole area surrendered by the Treaty. There is no other suggestion on that branch of the case, and I do not see that any fairer or better rule could be adopted.

Then, in regard to the claim made by the Dominion, the province, as an alternative defence, alleges that, if it should be held that the province is under any liability to indemnify the Dominion, it is not liable except where there has been a money payment, undertaken by the Dominion under the terms of the Treaty, made to the Indians wholly as a consideration for the ceding of their claims to the territory covered by the Treaty. In a general way, with some slight modification, that proposition may, I think, be accepted. It seems equitable that the Dominion should recover from the province a proportionate part only of such expenditure under the Treaty as is fairly referable and attributable to the discharge of the burden of the Indian title in the lands described in the Treaty; and that the Dominion should not recover from the province any portion of the moneys expended in the extinction of prior claims of the Indians, or in respect of obligations resting upon the Crown and the Dominion in relation to the administration of Indian affairs. It is argued for the province that the question of determining what part of the expenditure made by the Dominion and

now claimed from the province is referable to the extinguishment of the Indian title, is so difficult, and the matter so indefinite and uncertain, that the Dominion cannot, or ought not, to recover anything. I agree that the question presents difficulties, and that it is one which would be more easily dealt with by reasonable negotiation and agreement between those who represent the parties than by a judicial determination. But the fact that the inquiry is difficult affords no reason for the Court refusing to attempt its solution if the parties cannot themselves agree. The inquiry on this branch of the case was not concluded. It is open for further evidence, and of course for further argument. The inquiry will be continued before the Court itself or by a reference, as may be subsequently determined. In the meantime it may be taken for granted that the amount to which the Dominion will be entitled as against the province will exceed greatly the sum necessary to allow an appeal from the decision upon the main question discussed.

On the claim of the Dominion of Canada against the province of Ontario, there will be judgment for the Dominion, and a declaration that the province is, in respect of the obligations incurred by the Crown and the Dominion under the North-West Angle Treaty No. 3, which involve the payment of money, and which are referable to the extinguishment of the Indian title in the lands described in the Treaty, liable to contribute to the payments of money made by the Dominion thereunder in the proportion that the area of such lands within the province bears to the whole area covered by the Treaty.

[BURBIDGE, J., 18TH MARCH, 1907.

MASSICOTTE v. THE KING.

Crown—Public work—Negligence—Injury to person—R.S.C. 1906 c. 140, s. 20 (c.)—Neglect of fellow-servants—Fault of person injured.

Upon a claim for damages by the widow of an employee of the government, who was killed by the explosion of one

of the boilers of a dredge, such accident being alleged to have been caused by the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment, the registrar, acting as referee, found that the deceased met his death in an explosion which happened by reason of his own neglect of duty as watchman of the boilers on the dredge, and not by reason of the negligence of some fellow-servant, being an officer or servant of the Crown, as alleged. On appeal from the registrar's finding on this question of fact, it was contended that, as the type of boilers used on this dredge required constant and exacting care and watchfulness to see that sufficient water was maintained therein, and that any neglect of duty in that behalf was likely to lead to an explosion, the deceased's superior officers were negligent in permitting him to be and remain in charge of such boilers.

Held, affirming the registrar's report, that the facts did not disclose a case of negligence for which the Crown should be liable under R. S. C. 1906 c. 140, s. 20 (c); and that the accident happened through the deceased's own fault, and not through the neglect of his fellow-servants. The deceased knew as well as his fellow-servants the care that was required in his employment, and the danger to which he was exposed in case he neglected his duty.

Martineau, K.C., for the suppliant.

Bérard, for the Crown.

[BURBIDGE, J., 25TH MARCH, 1907.

CLINTON WIRE CLOTH CO. v. DOMINION FENCE CO.

Patent of invention—Infringement—Improvements in machinery for making wire fences—Validity.

Held, that Canadian letters patent No. 68649, bearing date the 8th September, 1900, granted to John Cronston Perry for alleged new and useful improvements in ma-

chines for making wire fences, are good and valid in respect of the following claims:—

6. A machine of the character specified, comprising a plurality of welding devices, adjustable mechanism for feeding wires to said welding devices, and a support on which said welding devices are mounted adjustably with relation to each other.

7. A machine of the character specified, comprising a plurality of electrical welding devices, each including electrodes and a transformer, a main circuit in which said welding devices are arranged in multiple arc, and a circuit controller for each welding device.

33. A machine for making wire fence, comprising means for feeding the strand wires, means for feeding the stay wires transversely thereof, and means for electrically welding said wires at their points of contact.

36. A wire-welding machine comprising means for supporting a plurality of intersecting wires, and means for automatically welding said wires at their intersections, said means including a plurality of transformers and electrodes and one or more circuit breakers.

40. A machine of the character specified, comprising a plurality of electrical welding devices, each including electrodes and a transformer, a main electrical circuit having a branch leading to each of said welding devices, a circuit closer for each branch circuit, and means for automatically operating said closers in succession.

W. Cassels, K.C., and *A. W. Anglin,* for the plaintiffs.

J. B. Clarke, K.C., and *J. Hales,* for the defendants.

[BURBIDGE, J., 25TH MARCH, 1907.

UPSON-WALTON CO. v. THE "BRIAN BORU."

Ship—Goods supplied to—Liability of owners—Credit.

The appellants, who were ship-chandlers, had for a long period been in the habit of supplying the D.C. Company

with goods for use on their dredges, tug-boats, and other contracting plant. The goods were generally supplied in small quantities, and paid for on delivery. It was not shewn that there was ever an open account between the appellants and the company. In September, 1904, and later in that year, the company were working upon a break-water; part of the plant with which that work was carried on consisted of a dredge, a tug-boat, and two dump-scows. These vessels had been leased by the company to the D. and S. D. Corporation. During the months of September, October, and November, 1904, the appellants supplied to the D. C. Company goods which were used on these vessels or in connection with the work that was being carried on by means thereof. The goods were ordered by the D. C. Company's foreman, and were charged to that company in the appellants' books, and the accounts therefor were in the first instance made out to the D. C. Company. In that respect there was at the time no change in the manner of dealing between the appellants and the D. C. Company; but, after that company had made an assignment, the appellants sought to enforce the claim against the defendant vessels.

Held, affirming the judgment of a local Judge, that the goods were supplied on the credit of the D. C. Company, and not on the credit of the vessels themselves, and that the action should be dismissed.

J. H. Rodd, for the appellants.

F. A. Hough, for the respondents.

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W. T. WHITE,
GENERAL MANAGER

THE
CANADIAN LAW TIMES.

MAY, 1907.

SCANDALOUS MATTER, PROLIXITY, AND IMPERTINENCE IN PROCEEDINGS IN COURT.

IT may be well to define, as nearly as possible, the meaning of the terms "scandalous matter," "prolixity," and "impertinence," and to inquire on what grounds the Court exercises its jurisdiction in regard thereto and on whose behalf; also what the result to the party guilty of introducing the matter.

Webster's dictionary defines "scandalous matter" as something giving offence to the conscience or moral feeling, and again as something defamatory or libellous; "prolixity" as something extended to an unnecessary length; and "impertinence" as irrelevance.

An examination of the authorities will shew that the lexicographer's definition of "scandalous matter" is too wide, of "prolixity" too narrow, and of "impertinence" in accord with legal interpretation.

Dealing with the first mentioned, we find it laid down that nothing, however offensive otherwise, can be classed as scandalous which is relevant to the matter in issue: Fisher v. Owen (1878), 8 Ch. D. 653; and this independent of whether the statements made are, as a matter of fact, true or false: Ex p. Simpson (1809), 15 Ves. 476. The sole question is: is the allegation made in a statement of claim a good part of a good cause of action? In a statement of defence, is the statement, if true, a good matter of defence? Then, however hurtful, unseemly, or unmentionable, and

objectionable from a moral standpoint, it is legally not scandalous.

Instances of this are found in Fisher v. Owen, 8 Ch. D. 653, where it was alleged in an action to set aside an instrument that the plaintiff executed the instrument while in a state of stupor induced by drugs administered by the plaintiff; in Jones v. Huntingdon (1876), 3 Ch. D. 117, where the defence to an action for specific performance alleged that the plaintiff purchased at the sale as a puffer or spurious buyer, acting in collusion with the defendant, the seller; in B. v. W (1862), 31 Beav. 342, an action to set aside a mortgage, that the money was advanced by the mortgagee, a married man, to the plaintiff's father to assist him, the mortgagee, in seducing the plaintiff, a young unmarried woman. The doctrine is extended in Millington v. Loring (1880), 6 Q. B. D. 190, to a statement made which may affect the quantum of damages—in this instance an action for breach of promise of marriage, where it was alleged that the defendant, while engaged to marry the plaintiff, had seduced her. In Christie v. Christie (1873), L. R. 8 Ch. 499, the law is discussed, and it is held that where the offence, a prosecution for fraud, is unconnected with the matter in issue, it cannot be set up.

Prolixity. It was laid down in Davy v. Garrett (1878), 7 Ch. D. 486, that prolixity may consist of one of two things: (1) stating things necessary at too great a length; or (2) stating things altogether unnecessary. (The writer ventures to think that the latter instance would more properly be classed as impertinence, and that another instance might be given, viz., the stating of things in a pleading in such a manner as to tender no issue. This latter is usually coupled with unnecessary length, but need not be so.)

Instances of prolixity are to be found in Davy v. Garrett, 7 Ch. D. 473, where, although the plaintiff set out in extenso a vast number of documents and letters, properly evidence, he tendered no issue; and in our own courts in Brock v. Tew (1899), 18 P. R. 30, where a statement of de-

fence sinned in a like manner. In Caston v. Craddock (1876), 3 Ch. D. 376, part of the pleading was irrelevant and part scandalous.

Jurisdiction. The rule applying (in Ontario) is Con. Rule 296, which reads: "296. If upon the hearing of a cause or matter, the Court is of opinion that any pleading, petition, or affidavit, or any part of a pleading, petition, or affidavit, is scandalous, the Court may order the pleading, petition, or affidavit to be taken off the file, or may direct the scandalous matter to be expunged, and may give such directions as to costs as may seem just."

Rule 297 provides for application being made at any time before the hearing.

Rule 298 gives power, at any stage of the proceedings, to strike out or amend any matter in the pleadings which may be scandalous or tend to embarrass a fair trial of the action.

The dealing with scandalous matter is much older than the Rules, and is founded on a power inherent in all courts of justice to prevent their process from being abused or becoming a means of oppression.

As early as 1809, in Ex p. Simpson, 15 Ves. 476, it was laid down without hesitation that the Court would act upon its own motion in striking out scandalous and irrelevant matter, and either in bankruptcy or in case, and without any application made to it. The law is laid down in almost the same words in Christie v. Christie (1873), L. R. 8 Ch. 499; Middlemas v. Wilson (1875), L. R. 10 Ch. 230, at p. p. 233; Cracknell v. Janson (1879), 11 Ch. D. at p. 13; Goddard v. Parr, 24 L. J. Ch. 783, 3 W. R. 633; and in our own Courts in Saddler v. Smith, 7 P. R. 409, 15 C. L. J. 52. It follows that, as the Court has jurisdiction to expunge scandalous matter from its records of its own motion, it can do so on its attention being called thereto by a stranger to the proceeding, as well as by one who is a party thereto. It does not follow, however, that the stranger to

the cause can have scandalous matter as regards him struck out or dealt with as a matter of right, and where a stranger applied for and obtained an order ex parte, this order was afterwards discharged: Williams v. Douglas (1749), 6 Beav. 82. The proper course for a stranger is to apply by petition, which will be referred to a Master of the Court for inquiry: Bishop v. Willis (1749), 6 Beav. 83.

The result of the introduction of scandalous matter, where the attention of the Court is called to it, is a direction that the party introducing it is liable to pay the costs of the party applying to strike it out, these costs to be taxed as between solicitor and client, and that in some instances the solicitor responsible for the introduction of the scandalous matter into the Court files be ordered personally to pay the costs, while in others he has been committed. In Ex p. Thorpe (1791), 1 Ves. Jr. 394, the judgment was that the solicitor should pay the costs, these to be taxed as between solicitor and client, and further that the solicitor should stand committed, and this although the counsel for the applicant (the then Attorney-General) did not ask for punishment of the parties offending, but merely that they be reprimanded. Rattray v. St. George (1809), 16 Beav. 232, was a case of a pauper suing, and scandalous matter introduced by the defendant. Lord Eldon directed that the matter be struck out, with costs to be taxed as between solicitor and client, and that Dives costs and not pauper costs be taxed. It is to be remarked that no order for immediate payment was made.

WILLIAM STEERS.

Lindsay, 2nd April, 1907.

FORMATION OF CONTRACT IN ENGLISH LAW.

From the German by Ernst Schuster, translated by F. W. Wegenast, Osgoode Hall.

(*Concluded*).

Having thus defined the legal idea of will and of consensus, we may proceed to shew in what manner the consensus may be effected. It takes place as a rule in the following manner: (g) On the one side, the terms of one or more obligations are proposed, with an intimation of willingness to become either creditor or debtor, or both, with regard to these obligations, and, on the other side, these terms are acceded to with an intimation of willingness to be reciprocally bound by the obligation. The symbol for the first fact is offer; of the second, acceptance.

THE ORIGIN OF CONSENSUS.

1. *The Offer.*

The offer must be expressed in a definite manner, its terms must comply with certain requirements; and it is further necessary to inquire whether the offer must be addressed in any particular direction.

We shall discuss, therefore, (a) the manner of expression, (b) the terms, (c) the direction.

The Manner of Expression.

(a) The offer must be of such a nature that it influences the will of the offeree who expresses himself in his accept-

(g) German writers, so far from analyzing the process of formation of all contracts into offer and acceptance, as does Anson, scarcely take these ideas into consideration. With them an agreement consists of mutual declarations (erklärungen) or expressions of one's thought [illegible] and upon the mutuality of these declarations —the manner [illegible] that they are to be relied and acted upon— depends [illegible] a valid agreement. Correlative terms corresponding [illegible] are very rarely employed.

ance. In the case of an express offer, which the offeree simply accepts, this is obvious; not so in the case of offers which are indicated by acts or surrounding circumstances.

The rule may be illustrated by the following examples:—

In Taylor v. Laird, 1 H. & N. 266, 25 L. J. Ex. 329,[35] the captain of a vessel had severed his relation with the owner of the vessel, but later rendered services on the vessel. His claim for remuneration for these services was not upheld. Chief Baron Pollock says in his judgment: "A recognition or acceptance of services may be sufficient to shew an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services. But in this case it was not so. The benefit of the service could not be rejected without refusing the property itself."

In Lamb v. Bunce, 4 M. & S. 275,[36] a surgeon had treated a patient in a public almshouse. The parish officer concerned knew of the treatment. Lord Ellenborough says in his judgment: "When the parish officer in the performance of his duty visited the patient and learned that the plaintiff, who was usually employed for the inmates, was attending the patient, and did not refuse his services, he virtually ordered them."

The decided difference between the two cases lies in the fact that the captain, or the owner of the ship, allowed the work to be done because he could not prevent it; while the tacit offer of the surgeon did in fact (in the sense of our definition) influence the will of the parish officer, i.e., since he allowed the surgeon to render the services, it should have been his intention to accept the offer (to treat the invalid in return for an honorarium to be paid by the parish).

It follows from the same rule that when the offer consists of a number of terms, all the terms must influence the

[35] Cf. Leake, 59; Anson, 19.
[36] Cf. Leake, 57.

will of the offeree.[87] In Henderson v. Stevenson, L. R. 2 H. L. Sc. App. 470, the plaintiff had bought a ticket for the passage from Dublin to Whitehaven on a steamer belonging to the defendants. On the face of the ticket were the words "Dublin to Whitehaven;" on the back the defendants disclaimed all liability for any damage which might ensue either to the passenger or his baggage. The ship was wrecked, and the baggage of the plaintiff was lost. The House of Lords decided that the notice on the back of the ticket could not be regarded as a part of the offer of the defendants which the plaintiff had accepted. It could not be assumed, so it is said in the judgment, that the plaintiff had accepted a part of the offer, "which he had not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which was printed or written upon the face of the contract presented to him." If, for example, on the front of the ticket there had been the inscription "See other side," then the promisor would have been bound by the terms of the offer contained upon it.

In apparent contradiction to the above rule stands the oft-cited case of Williams v. Carwardine, 4 B. & Ad. 621, Langdell, 13. The facts were as follows: Plaintiff had given information which led to the discovery of a murderer, and claimed the reward which had been publicly offered for such information. To the question whether the plaintiff had been induced by the promised reward to give the information, the jury answered "No;" nevertheless, her claim to the reward was upheld. From the expressions used by some of the Judges, it might be gathered that it was entirely immaterial whether the plaintiff knew of the reward when she

[87] Anson says, at p. 20: The offeree must know all the terms of the offer, or their existence must be brought to his notice. This is going too far, however. They must either be brought to the notice of the offeree in such a manner that he ought to know them, or they must be regarded as prescribed by the law as the necessary consequences of these terms which are immediately apparent; then he ought also to know them; whether their existence has, as a matter of fact, been brought to his notice does not signify.

gave the information. If this is correct, then the decision cannot be reconciled with others which are equally binding. It may be interpreted, however, that it is not the business of the Court to inquire for the motive of the plaintiff, and that, since the contrary was not asserted, it was to be assumed that the plaintiff knew of the advertisement.

In an American decision, Fitch v. Snedaker, Langdell, 110, in an analogous case, where, however, it was shewn that the plaintiff knew nothing of the advertisement, the claim failed, and that in the face of a reference to Williams v. Carwardine, upon which decision the second of the above suggested interpretations was put. In the judgment it is said: "The motive which induces the consent may be irrelevant, but the consent is an essential requisite. . . . But how can there be a consent or assent to a proposal of which the party has heard nothing?"[38]

(b) *The Terms of the Offer.*

The terms of the offer must be lawful and of such a nature that the obligation which eventually ensues may be taken into consideration by the law. This follows as a consequence of the nature of a contract as a legal transaction, and need not be further discussed here. If a reasonable man, who had been placed in circumstances similar to those of the alleged proposal, would not have inferred sufficient legal significance from them, no contract will arise.[39] So, e.g., a promise to buy a piece of land, except so much of it as shall be required for the purposes of a railway in process of construction, is too vague.[40] On the same grounds,

[38] The possibility of such an instance has likewise engaged German jurisprudence. Windscheid (§ 388, note 5) believes that the law will never venture to acknowledge that a person who has acted in ignorance of an offer of reward has no claim upon it. He thinks that in such a case the acceptance of the proposal involved in the published reward might follow the completed performance by way of an express declaration of acceptance.

[39] Cf. Pollock, 42.

[40] Pearce v. Watts, L. R. 2 Eq. 492, cited by Pollock, 42.

a claim based on a promise by which the defendant had bound himself to pay £5 sterling more than the settled price for a horse "if it should bring him luck," was not upheld.[41]

Pollock cites as belonging here a number of decisions which he summarizes under the rule: "*Nulla promissio potest consistere quae ex voluntate promittentis statum capit.*" (L. 108 § 1 D. de. V. O. 45, 1). It must not, however, be concluded from this that a rule such as the Roman law bases on this and other maxims also exists in English law. The Roman rule deals merely with cases in which it is obvious that the performance depends on the opinion of the promisor whether he is to perform his promise or not. Such an agreement is absolutely void.[42]

The English rule deals with cases where it is questionable whether the extent of the obligation, merely, or existence of the obligation itself, is dependent upon the opinion of the party under the obligation. Further than this, such an agreement can certainly not be regarded as void, for, as Pollock himself comments on the decision in Roberts v. Smith, 4 H. & N. 315, the obligation to indemnify some one for a performance (which would arise from the facts as in Lamb v. Bunce) may be validated by the fact that an agreement was made in accordance with which the indemnity for the service in question is to be left to the opinion of the party to whom they were to be rendered. The question in all these cases is whether there is a valid contract. The Court decides that in strict compliance with the terms of the contract, the plaintiff must fail if it is so determined. In Taylor v. Brewer, 1 M. & S. 290, Mr. Justice Bayley bases his decision on the "plain meaning of the resolution of the committee" (which contained the terms of the offer), and Baron Bramwell says in Roberts v. Smith (at p. 315): "Therefore (i.e., because an express contract had been made) there is no room for presumption; for

[41] Guthing v. Lynn, 2 B. & Ad. 232, Benjamin, 57.

[42] *Sub hac condicione: Si volam nulla fit obligatio pro non dicto enim est.* sq. (1 8D. de O. & A. 447, cf. Windscheid, § 93.)

we have the actual facts, and these are . . . What is the apparent and literal meaning of these words?" There is therefore no inconsistency in the fact that in another similar case the plaintiff succeeded. He had said in his offer, "I leave the amount of my remuneration entirely to you." Lord Abinger says in his judgment: "From the fact that the amount was left open it may be concluded, it seems, that any amount at all might be paid." [43]

It is further to be observed with regard to the terms of the offer, that a distinction must be drawn between representations which involve promises of services and those which only consist of a statement of facts. The incorrectness of such statement can be regarded as a breach of agreement only in exceptional cases. Such statements, therefore, form only in exceptional instances an essential part of the proposed contract.[44] A fraudulent statement will, of course, give rise to an obligation *ex delicto.*

(c) *The Direction of the Offer.*

The direction of the offer has already been partly discussed under requirement (a). Since the will of the offeree must be influenced, the offeror must obviously see to it that the declaration reaches him, and must therefore as a rule direct it to him. It is to be observed, further, that it is more difficult to determine, as Windscheid[45] remarks, whether a declaration is to be regarded as an expression of intention or "a mere talking of intention."[46] It is not necessary, however, in English law in the case of express declarations that they should be directly addressed to the obligee. This may be shewn from the decision in Alexander v. Wane, 5 M. & W. 511. In this case A. purchased goods from B. in the presence of C. C. said to B.: "If A.

[43] Bryant v. Flight, 5 M. & W. 114.

[44] Pollock has a very interesting and exhaustive discussion of this subject in chapter IX., and appendix note 1.

[45] § 309, 3.

[46] Schlossmann, 63.

does not pay you, I will stand for them;" and did in fact pay for the goods, because A. did not pay for them. C. sued A. for the repayment of the money laid out, and succeeded in his suit. The statement by C. to B. was recognized as an offer directed to A. to eventually pay him, whereupon A. in that he offered no objection tacitly bound himself eventually to make compensation for the payment. The obligation of A. to C. is not, as might be supposed, the duty before mentioned prescribed by law, of the principal debtor towards his surety, for the statement addressed by C. to B. did not, according to English law, give rise to a valid guarantee.

The admissibility of an offer directed to a person not primarily ascertained is, as Windscheid, referring to Schlossmann, remarks, no proof that the declaration need not be directed towards the offeree. The offers of this class require special treatment which is to follow. This includes: (i) the auction; (ii) the advertisement; (iii) some mixed instances.

(*i*) *The Auction.*[47]

As a rule every bid at an auction is, in English law, regarded as an offer, the acceptance of which, on the part of the auctioneer, follows the falling of the hammer. It is expressly decided that the bidder may, before the hammer has fallen, recall his bid;[48] that the vendor need not accept the highest bid;[49] and also that the seller is not bound to put up for sale the things that have been advertised.[50] Here, then, we deal, not with an offer to an unascertained person, but with an invitation to make offers. It is otherwise, however, where the seller indicates that the auction is to be without a settled minimum (without reserve). In a case of this kind[51]

[47] For German theories on this point, cf. Windscheid, § 308; Stobbe, § 169.

[48] Payne v. Cave, 3 T. R. 148; Langdell, 1.

[49] Spencer v. Harding, L. R. 5 C. P. 563.

[50] Harris v. Nickerson, L. R. 8 Q. B. 286.

[51] Warlow v. Harrison, 1 E. & E. 295, cited at length by Benjamin, 444.

the majority of the Court of Appeal decided that the advertisement of a sale "without reserve" is an offer which is accepted by every bidder on the condition that no one bids higher. A comparison with accepted theory in Germany on this subject reveals a unanimity, so far as regards the application to the circumstances of individual cases; but it is to be observed, that in English law the advertisement of an auction is, as a rule, to be regarded as an invitation to make offers. The cases where the advertisement is an offer to the bidder are always to be regarded as exceptions. According to German law, moreover, a bid, even when it is only an offer to contract, may not be recalled, while in English law, as we have seen above, this is allowed.[52]

(*ii*) *The Advertisement.*

An advertisement cannot, in English law, be regarded as a promise binding on one side,[53] because the requisite "consideration" is absent. The case of Williams v. Carwardine, which might leave it in doubt whether an advertisement is an offer to an unascertained person which is binding only after acceptance, has been discussed above. An advertisement is an offer to enter into a contract. The act which is undertaken in consequence of the offer is the acceptance, and there is no reason for applying in such cases any other rules than those which are applicable when an offer of any other sort is made by one party and accepted by the other party by words or acts so as to give rise to a contract.[54]

(*iii*) *Mixed Cases.*

A railway company, by the publication of its time table, makes an offer to all who wish to procure a ticket. The acceptance follows when some person declares himself willing to purchase a ticket. If the ticket agent refuses to issue the

[52] According to Stobbe, a bid is a promise binding on one side.

[53] As to the German view on this point, cf. Stobbe, § 171, 1.

[54] Cf. the American decision Fitch v. Snedaker, Langdell, 111, and Loring v. City of Boston, Langdell, 85.

ticket because the train is not to run as announced, the would-be passenger, if he has sustained damage, has a right of action.[55]

A banking house which issues a so-called indorsed letter of credit, authorizing some one in compliance with certain conditions to negotiate bills of exchange up to a certain amount upon the banking house, and calling upon the acceptor of the bill of exchange to indorse upon the letter of credit the amount of the draft, offers, by so doing, to the acceptor of the draft (provided the prescribed conditions are fulfilled) to bind itself to accept the bills of exchange. By the purchase of a draft a perfect contract is created.[56]

With regard to all offers to unascertained persons, there are two additional observations to be made.

1. It must be remembered that it is difficult to find the boundary between offers directed to unascertained persons and invitations to make offers. A general rule cannot therefore be formulated. The circumstances of each individual case must be taken into consideration.[57]

2. In what manner may an offer of this kind be revoked? As we shall see below, an offer is to be regarded as revoked if it is not accepted within a reasonable time. This rule is applicable here also, and in America a similar case was decided on the same grounds.[58] But when a reasonable time, or the time prescribed in the offer, has not elapsed, then, in other cases, the revocation must be brought to the notice of the offeree before he accepts. But how can an unascertained person be notified? In England the question has not yet been decided. In America the Supreme Court has decided[59] that an offer made by a public announcement is to be re-

[55] Denton v. Great Northern R. W. Co., 5 E. & B. 860, 25 L. J. Q. B. 129; Pollock, 15; Leake, 25; cf. also the above-cited decision in Warlow v. Harrison.

[56] In re Agra and Masterman's Bank, Ex p. Asiatic Banking Corporation, L. R. 2 Ch. 391; Pollock, 21.

[57] Pollock, 16; cf. also Windscheid, § 308, 3.

[58] Loring v. City of Boston, Langdell, 84.

[59] Shuey v. United States, cited by Pollock, 20.

garded as revoked when the announcement of the revocation is made in the same manner as the original announcement, and that even with regard to one who has acted upon the original announcement without knowing of the subsequent revocation, "for he should have known that it could be revoked in the manner in which it was made."

It is therefore undoubtedly true that an offer may, in English law, up to the moment it becomes a completed contract, be revoked because a bare promise without consideration is without any effect, and the consideration can only be said to be in existence when the contract has been perfected. The point of time when the contract becomes perfected will be discussed in the next section. We shall here inquire in what manner the revocation of a contract may take place.

(a) The offer is revoked by the death of the offeror or of the offeree. This rule occasions less complication in English law than it does in Roman law, because, as we shall see below, the contract is perfected by the declaration of acceptance, so that the case in which one of the parties dies after the declaration of acceptance has been given, but before it has reached the offeror, need not be considered. Pollock says (p. 36) that it cannot be gathered from the precedents whether it is necessary to notify the other party of the death. From an expression of Lord Justice Mellish in Dickenson v. Dodds,[60] it might be gathered that such a necessity does not exist. He says: "It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead." But, as this was not an essential part of the decision, it cannot be regarded as binding. When Pollock, in spite of this, disputes the necessity of notification, and resorts to the analogy of agency, which, by the death of the principal without any notification to the agent, ceases, it must nevertheless be observed that according to Roman law an offer was suspended on the death of the offeror without any further noti-

[60] 2 Ch. D. 473.

fication, while the heirs of the principal are obliged to recognize the acts of the agent which he has done in ignorance of the death of his principal; so that in that case the rule exists without reference to the analogy.[61] It is also worthy of note that in regard to the revocation of the offer by the death of the offeror the English law agrees with the Roman law, while according to German law as a rule the heirs of the offeror are bound[62] if the offeree accepts. In the rule that the representatives of the offeree cannot accept the offer after the death of the offeree, the English law likewise corresponds[63] with the Roman law, while in German law the contrary is the case.

(b) When an offer is held open for a definite length of time, it is revoked by the effluxion of this period without the necessity of an express revocation. That the prescribing of a period does not signify that the offer cannot be revoked within that time was decided in Routledge v. Grant, 4 Bing. 653, Langdell, 6. The much cited case of Cook v. Oxley,[64] is also given as authority for the rule. But in this case the question dealt with is merely whether, at the time the plaintiff purported to accept the offer, there was really an offer in existence. Since the latter fact was not alleged in the bill of complaint, the Court decided against the plaintiff.[65] This was therefore not a case in which the offer was held open for a fixed period, so that the admissibility of a revocation does not come in question.

Also with regard to this rule, English law corresponds to a certain degree with the common law as opposed to the

[61] Cf. Windscheid, § 307.

[62] Stobbe, § 169. 7. and the citation there from the codes: Preuszisches Landrecht, i. 5. ss. 106-108; Sächsisches Gesetzbuch, s. 818; Handels-Gesetzbuch, art. 297.

[63] Leake, 47.

[64] 3 T. R. 653; Langdell, 3.

[65] Cf. Benjamin, 68; Leake, 44.

modern German particular laws (h). According to common law the right of revocation is not, so far as it is not expressly renounced, excluded by the prescribing of a period for acceptance.[66] According to later particular laws, the offeror is, in consequence of his one-sided declaration, bound by an acceptance received within the prescribed time; and, where no period is set, within the time in which, according to ordinary custom of business, the answer may be received. (Stobbe, § 168, 4).

When, in consequence of the fault of the offeror, the period is not punctually complied with, the offeree, if he has acted properly, is not to suffer. In Adams v. Lindsell[67] the defendant had offered the plaintiff a quantity of wool at a certain price on condition that the answer should be received by return post. Through a fault of the defendant the letter containing the offer reached the offeree late. The plaintiff accepted the offer immediately on receipt of the letter. The defendant had, however, in the meantime otherwise disposed of the wool. The Court decided in the manner indicated.

(c) When no period of time is prescribed, the offer is to be regarded as revoked after the effluxion of a "reasonable" time.

In Ramsgate Hotel Co. v. Montefiore[68] the defendant had subscribed for shares on the 8th June. On the 23rd November he was notified of the allotment of the shares. The Court decided that the offer, since it was not accepted within a reasonable time, was to be regarded as revoked.

(d) As will be seen from the instances under (a), (b), and (c), an offer is revoked by the offeree's receiving notice

[66] Windscheid, § 307, 1.
[67] 1 B. & Ad. 681, Langdell, 4.
[68] L. R. 1 Ex. 109, Langdell, 43.

(h) The "particular laws" here referred to are the laws of the individual states of the German federation, corresponding in a sense to the "local customs" of England, while the "common laws" are those which are applicable throughout the Empire, being founded on the broad principles of the Roman law. F. W. W.

to that effect or by his becoming aware of dealings by the offeror which are inconsistent with the continuance of the offer, before the contract is perfected.

In this sense Pollock sets up the rule, which is not, however, generally accepted, and it is in fact the above mentioned decision in Cook v. Oxley which gives occasion for the doubt.

In this case the offer of the defendant was to the effect that he was willing to sell to the plaintiff a quantity of tobacco at a certain price on the condition that the plaintiff should be bound to buy the tobacco on the terms proposed and to notify the defendant of his acceptance before four o'clock of that day. The plaintiff complied with the conditions and notified the defendant before the time set, but the defendant refused to carry out the transaction. The judgment says in effect: Either the first conversation established a contract with the condition that the notice should be duly given within the time, or a contract arose when the notice was given. In the first case the contract was without consideration on the part of the other party, because the plaintiff was not bound; such a contract, however, is not recognized by the English law; the second case is also not true, for it has not been alleged that the defendant gave his consent at four o'clock.

We have already above given the interpretation of this case, which does not agree with our rule. It is, however, possible to interpret it as indicating that the offer may be tacitly revoked without notice to the offeree. This conception has led Anson in the first edition of his work (p. 17) to distinguish between contracts *inter praesentes* and those *inter absentes*, and to set up the rule that in the first instance the offer may be revoked without notifying the offeree.[60] In the second edition the rule has been modified, viz., on the ground of the cases decided in the meantime. In the case of

[60] A corresponding rule for agreements *inter praesentes* is to be found in art. 318 of the German Commercial Code. Cf. Thöl, § 238, 4.

Byrne v. Van Tienhoven, 5 C. P. D. 344,[70] to be discussed later, it is said, e.g.: "Both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties." As Anson does not abandon his interpretation of Cook v. Oxley, he assumes that there is either an inexplicable inconsistency, or that possibly the rule may be set up that in the case of such contracts *inter praesentes* notice of revocation is unnecessary, when it relates to the sale of a corporeal object to a third person, and the passing of the property in the same makes a revocation of the first offer unnecessary.[71]

Benjamin is of the same opinion as Pollock. He observes, indeed, that the contracts in question in the more recent cases were between absentees, but thinks that the expressions of the Judges are so generally construed that they must also be applied to cases where the parties are in one another's presence.

In America the decision in Cook v. Oxley has been interpreted in the same manner as by Anson, and has therefore been subjected to severe handling. In Kent's Commentaries it is said that these criticisms have completely shaken the authority of the decision.[72]

That the revocation need not be in the form of a notice directly addressed to the offeree follows from the decision in Dickenson v. Dodds. In this case[73] a parcel of land was offered to the plaintiff at a certain price, and a definite time prescribed for acceptance. Before the expiration of the time, the plaintiff learned that the defendant had sold the land to another person, and immediately accepted

[70] The case itself is one of contract *inter absentes*.

[71] In Cook v. Oxley it is not asserted that the tobacco was sold otherwise. The case of Dickenson v. Dodds, to which Anson also refers, is not in point, since the plaintiff knew of the sale before he accepted the offer.

[72] This and similar expressions are cited by Benjamin, 66.

[73] 1 Ch. D. 463.

the offer. His action failed. In the note to the case in the volume of the Law Reports it is said that the case decides that a revocation may take place without the knowledge of the offeree; but, as both Judges in their judgments dwelt on the circumstance that the plaintiff, when he accepted the offer, knew that the sale had been made, this is not warranted.

At this point it should be remarked that a claim of *culpa in contrahendo* does not arise in English law, and that the offeree himself cannot for his mere negative interest in the contract claim damages.

THE COMPLETION OF THE CONTRACT.

(a) *The Manner of Acceptance.*

By the acceptance of an offer the contract becomes completed. Only an unqualified assent to the offer is regarded as an acceptance. The rule, "An acceptance upon conditions or limitations constitutes a refusal of the offer combined with a new offer,"[74] holds good, also, in English law.

An inquiry as to some modifications of the terms of the offer is not to be regarded as a refusal of the offer; that is, it still remains open for the offeree, if the modification is refused, to accept the original offer.[75]

If the offeree accepts the offer with an unimportant modification without calling the attention of the offeror to it, he cannot subsequently attack the contract on the ground of want of agreement.[76]

An expression of dissatisfaction is not to be regarded as a refusal of the offer, when it is otherwise to be inferred that the offeree nevertheless means to accept the offer. In a decision to this effect[77] such an acceptance is characterized as a "grumbling assent."

[74] German Commercial Code, art. 322; Stobbe, § 168, IV. 6; Windscheid, § 307, 5; and the recited L. 1, § 3 D. de V. O. 45, 1.

[75] Stevenson v. McLean, 5 Q. B. D. 347; cf. Benjamin, 41.

[76] English and Foreign Credit Co. v. Arduin, L. R. 5 H. L. 64; cf. Addison, 17.

[77] Joyce v. Swadd, 7 C. B. N. S. 84.

(*b*) *The Time of Completion.*

The time of completion is that moment when the declaration of acceptance passes out of the control of the offeree; and this both in the sense that from that moment the contracting parties are bound and that from that moment the contract begins to operate. Occasionally the contract begins to operate at the moment when the offer is made. This occurs in the case where a person acts for another without any instructions to do so; the subsequent ratification operates as if it had been originally given. Since the English law does not recognize the notion of *negotiorum gestio*, unauthorized dealings are an offer of agency, of which the ratification is the acceptance.[78]

When acceptance has been made, revocation of the offer is without effect, even when the notice of revocation has previously passed from the control of the offeror. The principle upon which this rule is based follows as a necessary consequence from the conception of consensus above set up. When one leads another to believe that he has a certain intention, and to act on that belief, and the other acts upon this fact, then a consensus, in the view of the law, exists, even when the original intention has in the meantime been altered. Even in criminal law an act is said to be intentional when it was originally intended, and that indeed when the doer has repented and even seeks to prevent the consequences, such consequences are the result of his intention. The rule, moreover, was first expressly established in England in 1880 by the decisions in Stevenson v. McLean, 5 Q. B. D. 346, and Byrne v. Van Tienhoven, 5 C. P. D. 344.[79]

The contract is, it is true, complete when the declaration of acceptance has passed out of the control of the offeree,

[78] Bird v. Brown, 4 Ex.; cf. ib. p. 798.

[79] In Roman law the rule is the reverse. Cf. Windscheid, § 307, note 5 & 1, 4 pr. D. 40, 2: Si pater filio promiserit servum manumittere—deinde—ignorante filio vetuisset per nuntium et antequam filius certior fieret servum manumisisset liber non fit nam—durare oportet patris voluntatem.

yet as a rule only upon the implied condition that the declaration of acceptance comes to the knowledge of the offeror.[80] This rule is, however, subject to such extensive exceptions that it is of but little practical importance. When, for instance, "the offer explicitly or implicitly contains the condition that the offeree is to signify his acceptance by a particular act," then the agreement is binding, when accepted in the prescribed way, whether it has come to the knowledge of the offerer or not. If a person, for example, sends out an offer in which he says: "I wish to know whether you will sell me goods at such and such a price, and if you are agreed you are to send the first shipment on receipt of this proposition," there is no doubt that as soon as the goods are sent the contract is absolutely binding. So, also, if a person sends a letter in which he says: "I declare myself prepared, &c., &c. If you agree, send an answer by post;" then, as soon as the offeree has deposited his letter in the post, and given it out of his control, and thus signified by an outward act, beyond the possibility of doubt, the fact that both parties are bound, then the contract is completely and definitely established (i.e., the condition that the acceptance must be communicated no longer exists).[81] In other words, the mode which has been prescribed by the offeror himself is binding as against him.[82] If, therefore, "by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such an offer by a letter through the post is expressly or impliedly authorized," then the acceptance is completed by the posting of the letter, even if the letter never arrives.[83] Since such an authorization, either express or im-

[80] Pollock, 30; Leake, 34; but Anson, 24.

[81] Lord Blackburn in Brogden v. Metropolitan R. W. Co., 2 App. Cas. at p. 691.

[82] Pollock, 30.

[83] The decision in Household Fire Insurance Co. v. Grant, 4 Ex. D. 416, finally settled this point, former decisions not being quite to the point. One of the Judges, Lord Bramwell, was, however, of a different opinion.

plied, is almost always present in cases of contracts between absentees, the rule above set up is of prime importance.

Although the offeror is free to prescribe the mode of acceptance, he has not the right to decide that he may regard the silence of the offeree as acceptance. Even when it is further shewn that the person who thus silently accepts regarded the contract as completed, yet, no contract has arisen.[84]

It remains to discuss the question whether the declaration of acceptance may be revoked when the revocation reaches the offeror simultaneously with or before acceptance. There are no direct decisions on the point, but it is really a necessary consequence of the observations above that such a revocation is invalid. When, e.g., Lord Blackburn, speaking of the posting of an acceptance as an outwardly operative act which binds the contract, it must be meant that revocation is no longer possible. There is a dictum which confines this view; but, as it was not an essential part of the decision in the case, it is not binding.[84a] In contracts between absentees, a person who has declared his acceptance in writing and posted it can not recall it.[85]

Pollock, Benjamin, and Anson think that an acceptance is in English law irrevocable. In Scotland the contrary has been decided, for in Dunmore v. Alexander, Langdell, 117, it was recognized that a revocation which reaches the offeror at the same time as the acceptance avoids the acceptance.

A comparison with the theories on this point current in Germany would not help to clear the subject, since by reason of our divergent views on the theories of expression, accept-

[84] Felthouse v. Bindley, 11 C. B. N. S. 869.

[84a] 5 B. & Ad. 474.

[85] This proposition is employed as an antithesis to the case of an acceptance to a bill of exchange, which, so long as it remains in the control of the acceptor, may be revoked. This is of interest because Thöl, who also adheres to the view that an acceptance is irrevocable, relies chiefly upon art. 21, s. 4, Ger. Com. Code.

ance, and interpretation, no generally acknowledged doctrine can be set forth.[86]

If, in conclusion, a remark *de lege ferenda* may be permitted, it may be observed as the result of practical experience that it does not appear to be desirable that every rule should be measured from the standpoint of the interest of trade. The best interest of trade is the consistent and systematic building up of a system of law; clearly defined and logically coherent rules can always be adapted, no matter how they are expressed. . How unfruitful, however, the criticism of an individual rule from the standpoint of the interests of trade is, is shewn by the divergent views on this very point. If Thöl describes the permissibility of a revocation of acceptance as per art. 320, 2, of the German Commercial Code as "against all order;" and on the other hand Pollock[87] finds the reverse rule of the English law "contrary to common sense" and the interests of trade, one can no longer doubt the futility of such observations.

[86] Cf. Thöl, § 237. 4, note 22, 23; Windscheid, § 306; Stobbe, § 168. IV. 1.

[87] Essays in Jurisprudence and Ethics, 73.

RECENT CASES FROM THE TIMES LAW REPORTS.*

Agency.]—A ship master, in arranging for salvage of his ship, which had gone ashore, refused to accept (as he might have done) the services of a tug at a reasonable rate per day, and insisted, instead, on making an agreement on the "no cure, no pay" basis, by which the salvors were to receive £4,000 if they succeeded, and nothing if they failed. The master's authority to make a proper agreement for salving the ship was not questioned. On the advice of assessors that the agreement was not one which a reasonably prudent master would have made, and on the ground that it was not necessary to make it, in view of the other terms offered, the Court of Appeal, affirming the judgment of Gorell Barnes, P., [1907] P. 15, held that the master had no authority to make the agreement, and on this and another ground dismissed the action brought to enforce it: The Crusader, 23 T. L. R. 382.

Bankruptcy.]—An author having sold a copyright to a publisher in consideration of royalties on sales to be made, the publisher afterwards became bankrupt, and his assignee continued the sales. The author thereupon claimed royalties from the assignee. Held, however, that as the copyright had passed as part of the bankrupt's estate to the assignee, the author's claim must be limited to a claim for damages for breach of the agreement to pay royalties: In re Richards, 23 T. L. R. 388.

Dedication of Highway.]—In Corsellis v. London County Council, 23 T. L. R. 366, Neville, J., although in his view of the evidence the question was not material, holds, if and so far as may be necessary for the determination of the case, that there is no such thing known to the law as a dedi-

* Including cases in the number for the week ending 26th March, 1907.

cation of a way for a term. The action was brought for a declaration that a strip of land lying in front of 15 houses with shops, was private property, and had not been dedicated to the public as a highway. The defendants relied upon certain acts of alleged dedication on the part of the plaintiff, who was lessee for a term of 82 years. Mr. Justice Neville thought the evidence did not shew dedication, but held that dedication must be in perpetuity, and that dedication for a term is an interest in the public unknown to the English law. This appears to be the first express decision upon the point.

Forged Transfer of Shares.]—Bank of England v. Cutler, 23 T. L. R. 374, is a decision of interest. The defendant, a stockbroker, acting in good faith, after filling in a form containing particulars of the name of a person desirous of transferring certain shares of stock standing in her name on the books of the plaintiffs, personally attended with the transferor and identified her to the bank officials. The transfer was signed, and the stock afterwards transferred to a purchaser for value. In fact the signature to the transfer was a forgery, and the person identified by the defendant was not the owner of the stock. The plaintiffs, on discovering the fraud, purchased an equivalent amount of stock in the market to replace the stock transferred. The action was to recover from the broker damages caused by breach of warranty. In giving judgment for the plaintiffs, Mr. Justice Lawrence held that the defendant, by his conduct in the transaction, requested the plaintiffs to permit the owner to make the transfer, and warranted that the transferor was the owner of the stock, and promised to indemnify the plaintiffs if she was not.

Master and Servant.]—A driver of a motor omnibus has been held to be a "workman" and within the Employers' Liability Act, 1880: Smith v. Associated Omnibus Co., 23 T. L. R. 381.

Negligence.]—The plaintiff was the wife of the manager of a company, and lived in a house belonging to the defendants, of which the company was a sub-lessee. She was injured by the fall of a fixture, and a jury found that the fixture had been insufficiently secured by the defendants' workmen who had been sent to repair it, and had consequently become detached by reason of the vibration of the defendants' engines on adjoining premises. The plaintiff claimed damages on the grounds: (a) of nuisance in respect of the vibration; and (b) of negligence in respect of the faulty and dangerous condition of the fixture, the defendants having undertaken to do the repairs, and done them improperly. It was held by the Court of Appeal, however, that, as the plaintiff had no proprietary interest in the house, she could not have a cause of action for nuisance, and that, as the doing of the repairs was a purely voluntary act on the part of the defendants, they undertook in doing them no duty to the plaintiff. The defendants were not in control of the premises, and therefore the plaintiff could not succeed on the ground of invitation to use them. Nor could she succeed on the ground of an implied representation that the premises were safe, for the representation, if any, was made without knowledge of the defect, and, being innocently made, gave no cause of action: Malone v. Laskey, 23 T. L. R. 399.

Nuisance.]—That the actionable character of a work alleged to amount to nuisance does not depend upon the degree of care taken to remove the annoyance arising from it, is illustrated by a case of Polsue and Alfieri v. Rushmer, 23 T. L. R. 362, a decision of the House of Lords. The plaintiff, a dairyman, carried on his business in premises adjoining the defendants'; his shop being on the ground floor, and the rest of the building being used by himself and his family as a dwelling-house. The district was one specially devoted to printing and allied trades. The defendants placed in the basement of their premises a flat-bed printing

machine, and used it in the course of their business, sometimes working all night. The machine was of the most modern type, was almost noiseless when running, and was stated to have the advantage of being quite free from vibration. The trial Judge found as a fact that it had been carefully and properly worked. He had held that the day work did not constitute a nuisance, but that the night work caused serious disturbance to the plaintiff, amounting to legal nuisance. This was affirmed by the Court of Appeal and by the House of Lords, the Lord Chancellor referring with approval to Lord Justice Cozens Hardy's dictum: "It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam hammer is introduced next door and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard."

Principal and Agent.]—Agents collected moneys for their principal, and, with the principal's knowledge and consent, paid them into their general bank account, which contained moneys of their own, and also moneys collected for other persons in the same way. Out of this account they made disbursements from time to time on their principal's account. The agents subsequently went into liquidation, and the principal claimed to earmark as his own the moneys in the bank to the amount of the collections made for him. Held, however (distinguishing Re Hallet's Estate, 13 Ch. D. 696), that, as there was no fiduciary relationship as to these moneys, but rather the relation of debtor and creditor, established by the course of dealing between the parties, the moneys could not be followed: Wilson, etc., Line v. British, etc., Co., 23 T. L. R. 397.

Scienter.]—In an action for damages for injury caused by the bite of a vicious dog, the plaintiff was unable to shew that the dog had ever before bitten or attempted to bite any person. But it was shewn that, to the knowledge of the

owner, the dog was at certain times ferocious and likely to bite without provocation, and that it was negligently kept. Held, that the plaintiff was entitled to succeed: Barnes v. Lucile Limited, 23 T. L. R. 389.

Ship,]—In The "Tactician," 23 T. L. R. 369, the Court of Appeal held that, though the master of a ship is not entitled to interfere with the pilot in the navigation of the ship, yet, where the pilot who was in compulsory charge of a steamship mistook the lights of a vessel at anchor for those of a vessel in motion, it was the duty of the master to call the pilot's attention to the fact that the lights were stationary, and the steamship was therefore held to blame for a collision with the vessel at anchor.

Solicitor's Costs.]—A trustee in bankruptcy was allowed to reopen accounts settled between the bankrupt and his solicitor, to require itemized bills of costs, and to insist on particulars and vouchers before admitting proof of the solicitor's claim against the bankrupt's estate, notwithstanding that by reason of the settlements and of the lapse of time, the bankrupt would have had no such right: Re Van Laun, 23 T. L. R. 384.

Will.]—The decision of the Court of Appeal in Villar v. Gilbey, 22 T. L. R. 347, that a child en ventre sa mère at the death of a testator is a child "born in the testator's lifetime," within the meaning of the will, has been reversed by the House of Lords, 23 T. L. R. 392. The will gave estates tail to the sons successively of a living person, with a proviso that any son born in the testator's lifetime should take a life estate only. The House of Lords holds that the construction of the word "born" adopted by the Court of Appeal is only to be applied where such construction is necessary for the benefit of the unborn child, and not in the present case, where the effect of such construction would be to cut down to an estate for life the estate tail to which under the will the unborn

child would otherwise be entitled.——A testator by his will made certain bequests for scholarships, to be awarded upon terms contained in "any memorandum" signed by him and left with his papers. Such a memorandum was found, and was not attested in accordance with the Wills Act. Held, however, that, as the memorandum was in existence at the time of the execution of the will, and was sufficiently identified by the reference made to it in the will, it was thereby incorporated with the will, and must be admitted to probate: University College of North Wales v. Taylor, 23 T. L. R. 394.

THE LATEST ONTARIO DECISIONS.*

Assessment and Taxes.]—Upon a case submitted under s. 77 of the Assessment Act, the Court of Appeal in Re J. D. Shier Lumber Co. and Township of Lawrence, 9 O. W. R. 605, for reasons set out in the judgment of Moss, C.J.O., decided that holders of timber licenses are not liable to be assessed thereon; that lumber camps are not assessable; that the owners of lumber camps are not assessable for a business tax (under the conditions mentioned) with respect to the camps only; and that slides and dams are not assessable under the conditions mentioned.——A provision that the owner of land sold for taxes might redeem such lands, contained in 2 Edw. VII. c. 49, ss. 1, 2, and 3, an Act validating certain sales of land for taxes in the town of Fort William, was held by a Divisional Court in Ray v. Kilgour, 9 O. W. R. 641, to mean that any person having an interest in such lands which would entitle him to redeem, could do so whether other persons having such interests joined in the redemption or not.

Assignment of Chose in Action.]—To the plaintiff were assigned, by an instrument absolute in form, the claims of two New York contractors for work done upon the defendant's theatre in Hamilton. Riddell, J., held that the plaintiff could not recover, and distinguished the case from Wiesmer v. Packow, 76 L. T. 448 (C. A.), where the plaintiff was entitled to collect the money and deduct a commission, because here the plaintiff never was intended to collect the moneys or to be in a position to give a valid receipt for the claims, his solicitors were retained and paid by the assignors, he had no authority over them, he was not the real dominus litis, and the transaction was "merely a transac-

* Short notes of the most important cases in volume IX. of the Ontario Weekly Reporter, Nos. 10, 11, 12, 13, 14, pp. 417 to 720, inclusive.

tion under cover of the assignment to appoint the plaintiff as agent on behalf of the assignors:" Mills v. Small, 9 O. W. R. 421.

Banks and Banking.]—Of peculiar interest to banks and their customers is the decision of Clute, J., in Montgomery v. Ryan, 9 O. W. R. 572, that it is against the policy of the law, as is indicated by s. 46 of the Bank Act, 1890, that any person who is not a director should be allowed to inspect the account of any one dealing with the bank, and that any agreement which carries with it the right to inspect by such a person is illegal, and such person can take no benefit under such illegal agreement; and damages for such breach of duty will be awarded where such are shewn to have been sustained.

Bigamy.]—On a Crown case reserved, it is decided by the Court of Appeal in Rex v. Brinley, 9 O. W. R. 457, on the authority of In re Criminal Code, Bigamy Sections, 27 S. C. R. 461, distinguishing the case from McLeod v. Attorney-General for New South Wales, [1891] A. C. 455, that paragraph (a) of s.-s. 1 of s. 275 of the Criminal Code, 1892, is intra vires of the Parliament of Canada; that a decree of divorce procured at the instance of a wife who had become domiciled in a foreign state, in such state, against her husband, a British subject, domiciled in Ontario, and who had not appeared or taken any part in the proceedings, is not a valid and binding decree so as to constitute a good defence on a prosecution for bigamy in respect of a subsequent marriage; and that the element of intent, or mens rea, is not removed by the fact of the defendant knowing that such a decree had been granted, and his having been advised that he could legally marry again.

Conspiracy.]—An appeal by the defendants the Central Supply Association, in Rex v. Master Plumbers and Steamfitters Co-operative Association, Limited, and the Central Supply Association of Canada, Limited, from the judgment

of Clute, J., 7 O. W. R. 213, noted 26 C. L. T. 214, was dismissed by the Court of Appeal, Osler and Meredith, JJ.A., dissenting: 9 O. W. R. 450.

Contempt of Court.]—The defendants in Copeland-Chatterson Co. v. Business Systems Limited, 9 O. W. R. 610, offered as an excuse for disobeying an injunction, the statement that compliance with the injunction would have compelled them to disband their staff of skilled workmen numbering over 100, would have disorganized their business, and otherwise occasioned them serious financial injury, and that they had obtained a stay at the earliest possible moment. This was not deemed a satisfactory explanation by Mulock, C.J., who granted an application for a writ of sequestration, but before allowing it to issue gave the defendants an opportunity to purge their contempt by presenting to the Court a proper apology, by making proper reparation (including a fine amounting to not less than $250), and by paying the plaintiffs' costs.

Contract.]—Deschenes Electric Co. v. Royal Trust Co., 9 O. W. R. 517, turned upon the proper construction of the word "assigns" in a clause in a contract by which the plaintiffs were to supply electric current to one St. Jacques, reading as follows: "Provided that if, after the expiration of five years from the said 1st day of May, 1902, the said party of the second part, his heirs, executors, administrators, or assigns, is neither owner nor tenant nor occupier of the said hotel, whether by himself or together with another or others, then either party shall be at liberty to cancel this contract by giving notice in writing to the other party." Anglin, J., decided that the word in question meant assigns of the contract itself, or of the rights of St. Jacques thereunder, and that the latter being dead, his surviving partners, not being assignees of the contract, were not such assigns, and that they would not be such as assignees of the lease of the hotel; but, were the contrary the case, since the lease expired at the expiration of the five years named, and

thereafter they took under a new lease to themselves, they still would not be assigns after the date referred to.

Costs.]—Falconbridge, C.J., in Liddiard v. Toronto R. W. Co., 9 O. W. R. 508, held that, the defendants' solicitor being paid by salary, and entitled under an agreement with them to retain for his own use any costs which he might collect from litigants, the defendants could not recover more than disbursements.

Criminal Law.]—It is laid down by Riddell, J., in Rex v. Colahan, 9 O. W. R. 661, that no statutory authority exists for the imposition of a rule with respect to gaols that "no fine will be received or bail allowed after 5 p.m.," even if made by the inspector: R. S. O. 1897 c. 321, s. 12 (1); or if by the county council: s. 12 (2). "The power to pass regulations does not extend so far as to prevent a prisoner, through his solicitor or agent, transacting business at any reasonable time with any one—keeper or deputy-keeper included. And no common law power can be found inherent in keeper, county council, or inspector justifying such a rule."

Crown Patent.]—An appeal by the defendant in Drulard v. Welsh from the order of a Divisional Court, 7 O. W. R. 575, 11 O. L. R. 692, noted 26 C. L. T. 343, was allowed by the Court of Appeal because the evidence failed to shew a chain of paper title vesting in the plaintiff the title to the piece of land in dispute, and failed to shew a continuous, exclusive, and undisturbed possession by the plaintiff, or his predecessors in title, sufficient to put an end to the defendant's title under her letters patent. At most there was shewn a case of divided possession, and the defendant having the paper title was not obliged to shew actual possession: 9 O. W. R. 491.

Damages.]—The plaintiffs having made default in the construction of electric generators which had to be speci-

ally manufactured, and could not be procured in the market, and being aware of the special purposes for which these generators were to be supplied, were held by Anglin, J., in Royal Electric Co. v. Hamilton Electric Light and Cataract Power Co., 9 O. W. R. 437, to be liable to the defendants for the loss of profits which they actually had caused by inability to fulfil such contracts owing to the plaintiffs' default, and to pay any sums which the defendants might have had to pay for damages for breach of any such contracts held by them.

Discovery.]—The defendants in Northern Iron and Steel Co. v. Solway & Cohen, 9 O. W. R. 597, sued for breach of contract to supply the plaintiffs with 200 tons of scrap iron as required from time to time, were held by the Master in Chambers not entitled to discovery to enable them to shew from the plaintiffs' books that they were not in a position to pay for 2,000 tons, and set this up as a defence, payment for all iron delivered having been promptly made; but on appeal by the defendants this order was varied by Riddell, J., to allow the defendants to examine as to the financial standing of the plaintiffs at the time the contract was entered into, conditioned, however, on their filing an affidavit setting out alleged misrepresentations by the plaintiffs on this point: 9 O. W. R. 709.

Division Courts.]—It is held by Riddell, J., in Re Errington v. Court Douglas No. 27 Canadian Order of Foresters, 9 O. W. R. 675, that it is not a ground for prohibition that a Division Court Judge has wrongly decided that the plaintiff has taken all the appeals to the domestic forum open to him under the constitution of the society, and so conferred jurisdiction, the question before such Judge being, not, "In which Court is the action to be brought?" but "Can such an action succeed in law?"

Easement.]—The defendant in Ruetsch v. Spry, 9 O. W. R. 696, had sold to the plaintiff a parcel of land, part of a

larger parcel of land, on which part was a house lighted chiefly from the west, and whose western wall was situated within from one foot to two and one-half feet from the western limit of the parcel of land conveyed. The defendant thereafter erected upon the easterly limit of the land retained a close board fence about 7 feet high, which had the effect of shutting off the light and air from the western side of the plaintiff's house, and prevented the natural flow of the water from that side so as to interfere with the reasonable (comfortable) enjoyment thereof. Riddell, J., granted an injunction restraining the defendant from continuing this fence so as to produce the results mentioned, holding that the acts of the defendant were in derogation of his grant.

Estoppel.]—The agent of the defendants had authority to pledge and did pledge the defendants' credit with the plaintiffs. Their course of dealing was to supply the agent with money, and, as vouchers for payments were sent in, to credit the agent with such payments, and send on further moneys as might be required. The plaintiffs made out their accounts and put a receipt at the foot and handed them to the agent, who, without having paid them, forwarded such accounts and receipts to the defendants, who thereupon credited the agents with the amounts according to this practice. It was held by a Divisional Court that the plaintiffs were estopped from setting up to the prejudice of the defendants that the accounts had not been in fact paid by the agent: Gentles v. Canadian Pacific R. W. Co., 9 O. W. R. 601.

Evidence.]—In Sims v. Grand Trunk R. W. Co., 9 O. W. R. 469, an action for injuries sustained at a level crossing of a highway over the defendants' right of way, the Court of Appeal, while of opinion that evidence of a previous accident to one Moore at the same place was inadmissible, since the negligence charged was the failure of the defendants to give the statutory warnings, no case being made that the crossing was a particularly dangerous one requiring unusual

precautions, refused a new trial, holding that the defendants, having regard to the course of the litigation and the very moderate and reduced damages awarded on a second trial of the case, had not been prejudiced.——The ruling of a Divisional Court in Cuff v. Frazee, 9 O. W. R. 691, is that in order to adduce in evidence at the trial of a civil action the depositions of a witness taken at a previous trial, it is sufficient to shew that, after diligent search, the witness cannot be found.

Executor.]—An action by an executor for an account and delivery over of certain documents of the deceased, alleged by the executor to be in the defendant's possession, was held by Meredith, C.J., in Bartram v. Wagner, 9 O. W. R. 448, no fiduciary relationship existing between the parties, and none having existed between the defendant and the deceased, not to be maintainable. Though an action for discovery may still be brought, it was decided that, if this were to be considered such, no judgment could be pronounced: Bray on Discovery, p. 611.

Factories Act.]—It was decided by the Court of Appeal in Jones v. Morton Co., 9 O. W. R. 500, that by virtue of s. 1, s.-s. 5, of the Ontario Factories Act, R. S. O. 1897 c. 256, the employment of a person under 14 years in a factory is unlawful, and that as a consequence, where such a person is injured in such factory, proof of the age, the employment, and the injury, in an action for damages for such injury, creates a prima facie case. Notwithstanding a covenant by the lessor of the factory to keep a hoist used in connection therewith in repair, it was held that he incurred no liability for such injury occurring by reason of non-repair, because such liability must necessarily depend wholly on invitation, and any invitation was in this case cancelled and withdrawn, the person injured having been told that the hoist was out of order and not to use it.

Fatal Accidents Act.]—The action of Dewey v. Hamilton and Dundas Street R. W. Co., 9 O. W. R. 511, was one for

damages brought by a married woman, aged 47, for the death by the negligence of the defendants of her father, a man 74 years of age, who had gone "clean out of business," and was living with the plaintiff without paying board, and had talked of going into a new business, there being nothing to shew the probability of such new business being a success. The plaintiff had benefited under the father's will. In the circumstances a motion for nonsuit was allowed by Riddell, J.

Foreign Judgment.]—It is decided by Riddell, J., in Moritz v. Canada Wood Specialty Co., 9 O. W. R. 522, that a judgment recovered by default in England in an action commenced by a writ of summons, served out of the jurisdiction under and by virtue of Order XI., Rule 1 (64), 1883, corresponding to our Rule 162 (e), is valid where the plaintiff could, under the contract sued upon, require anything to be done by the defendants in England, though the affidavit leading to the issue of the writ falsely alleged that the contract was one to be performed in England. The jurisdiction of the English Court is not ousted, because what the defendants are required to do might have been done, without the jurisdiction, by letter, or by the fact that it was to be done after they had committed a breach out of the jurisdiction of the portion of the contract to be there performed. It is also held that while there was on the recovery of judgment in England a merger of the debt in the judgment, such recovery would not prevent an action on the contract in Ontario; and that the right to bring such action, while part of the property of the business carried on by the contractor, was not assignable, so that an incoming partner could by assignment acquire an interest therein.

Interest.]—It was decided by Clute, J., in Montgomery v. Ryan, 9 O. W. R. 572, that under s. 80 of the Bank Act, a bank can not recover interest at the rate of 7 per cent. compounded monthly. The usual monthly receipts for cheques confirming the account is held not to be an ac-

knowledgment that the customer will pay the rate of interest charged, being only prima facie evidence of the correctness of the account. The meaning of the statute is held to be that the bank may stipulate for 7 per cent., and in default of any contract, express or implied, the legal rate of interest for the time applies.

Jury.]—It was suggested by Garrow, J.A., in delivering the judgment of the Court of Appeal in Sims v. Grand Trunk R. W. Co., 9 O. W. R. 469, that it is not sufficient that counsel object to remarks in the address of the opposing counsel which exceed the bounds of fair and reasonable comment, but that he should ask for a ruling from the Judge, in order that, if there is error, it may be corrected on the spot.

Local Option By-law.]—Section 338 of 3 Edw. VII. c. 19 does not, Mabee, J., decides in Re Rickey and Township of Marlborough, 9 O. W. R. 563, require publication of the by-law and notice for 3 weeks, but that it shall appear in one number of the paper each week for 3 weeks. The consequence is that publication in issues of the 14th, 18th, and 25th December, 1906, was deemed sufficient, because these dates fell in 3 successive weeks.——The provision in s. 338 of the Municipal Act that the day fixed for taking the votes of electors upon a by-law shall not be less than 3 nor more than 5 weeks after the first publication of the proposed by-law, is held by Meredith, C.J., in Re Henderson and Township of Mono, 9 O. W. R. 599, to be not merely directory, and a failure to comply with it will invalidate the by-law.

Mandamus.]—An application for a prerogative writ of mandamus to compel the Grand Trunk R. W. Co. to run one train with third class carriages throughout the length of their line, and to permit the applicant to travel in such carriages for a penny a mile, was refused by Teetzel, J., in Re Robertson and Grand Trunk R. W. Co., 9 O. W. R. 629, because a specific and adequate remedy was provided under

the Railway Act on application to the Board of Railway Commissioners.

Master and Servant.]—It appearing from the evidence in Gould v. McCrae, 9 O. W. R. 626, an action for wrongful dismissal, that the plaintiff was hired for an indefinite time by the defendant—that there was a general hiring—a Divisional Court held that, on the facts, the inference of a yearly hiring might be drawn. For the reasons that the hiring was not by the day or a mere temporary hiring, and that there was evidence upon which a yearly hiring might have been found, and a presumption in favour of such, and for the reason that the plaintiff was at least in the position of a person entitled to reasonable notice of the determination of his employment, the Court directed judgment in his favour.

Mines and Minerals.]—The contention of the plaintiffs in La Rose Mining Co. v. Temiskaming and Northern Ontario R. W. Commissioners, 9 O. W. R. 513, was that a Crown grant issued to their predecessors in title and purporting to convey mining location J. S. 14, as shewn on a plan made by one Shaw, to them, conveyed to them the right of way of the defendants' railway subject to an easement in the defendants for the use of the right of way. The plan in question shewed the railway lands in green running through a 40-acre tract, and on either side 36 95-100 acres described by metes and bounds in a description accompanying the plan. It was also contended that under the Mines Act a mining location could not consist of less than 40 acres, and that the reference in the description to mining location J. S. 14 meant the 40 acres. Mabee, J., held, however, that this contention could not in the circumstances prevail, and that only the 36 95-100 acres were conveyed to the plaintiffs. Besides, were it otherwise, the Act 6 Edw. VII. c. 12, s. 2 (O.), destroyed any vestige of hope the plaintiffs could have of obtaining relief.

Money in Court.]—The question which arose in Re Sturgis, Sturgis v. Van Every, 9 O. W. R. 663, was one of some interest. A cheque for moneys in Court was issued in favour of a person who refused to accept it, and who repudiated the action of a solicitor in applying for and receiving it on his behalf. It was intended that the cheque should be returned to the Accountant's office, but it was lost, and probably destroyed; at all events, it was never presented; and after the lapse of 17 years the original payee came forward and applied to have a new cheque issued for the original amount with accrued interest. Riddell, J., very properly pointed out that the machinery of the Court never was intended as a convenience for those who are sui juris and who know their rights; and that it is the duty of those in that position to apply for and receive out of Court moneys to which they may be entitled at the earliest moment reasonably possible. At the same time, he did not think it reasonable to deprive the applicant of the whole of the accrued interest; and he made an order declaring the former cheque cancelled, and directing that a new cheque issue for the original amount with interest at 3 per cent., and without costs.

Municipal Corporations.]—Upon an appeal in Re Jones and City of Ottawa from the order of Falconbridge, C.J., 9 O. W. R. 323, noted ante 274, such order was varied by quashing ss. 6 and 13 of the by-law, which assumed to prohibit householders from disposing of their productive refuse, such as table waste, to dealers: 9 O. W. R. 660.

Municipal Elections.]—It was held by Macbeth, Co. C.J., in Rex ex rel. Armstrong v. Garratt, 9 O. W. R. 636, that the declaration required to be made and filed under ss. 311 and 129 (3) of the Municipal Act, may be made before the nomination, and that the objection that such declaration was so made cannot be taken after the election. This ruling was affirmed by Falconbridge, C.J.

Negligence.]—Bradd v. Whitney, 9 O. W. R. 656, was an action for damages for the death by electric shock of the plaintiff's son, while operating a defective calcium light in a theatre owned by the defendants, but in which a playing company were giving performances. The lad was employed by the latter company, and was under the charge and direction of their electrician. This company (that is, their stage manager and their electrician) had entire and sole charge of the stage and its surroundings, and of the place where the deceased was operating the calcium light, which latter was their property. The electrician of the owners was in charge of the house as contrasted with the stage, but in subordination to the company's electrician for the purposes of the performance, and it was not his habit, nor does it appear to have been his duty, to inspect or criticize the lamps owned and supplied by the company. In the circumstances, a Divisional Court held that the fact that the owners received a percentage of the gross receipts by way of rental, in the absence of any right of control, did not create the relation of partners between them and the playing company, so as to make them liable for the negligence of the latter.

Railway.]—It is decided by a Divisional Court in Yeates v. Grand Trunk R. W. Co., 9 O. W. R. 423, that s. 237, s.-s. 4, of the Railway Act, 1903, applies only to animals at large upon a highway, or otherwise at large, and has no reference to animals escaping from an adjoining field, where, apart from any defect in the railway fence, they were properly enclosed; and also that where an owner of land has, for his own convenience, constructed a gate and accepted it, there is a waiver of the duty to fence quoad such gate imposed by s. 199 of the Act; and a tenant is bound by such an agreement entered into by his landlord, whether he knew of it or not.——The Court of Appeal in Muma v. Canadian Pacific R. W. Co., 9 O. W. R. 475, held that there was no evidence to support the jury's finding that the defendants

were negligent in not having the train which caused the accident in respect of which the action was brought thoroughly equipped with brakes and flagmen, and that the accident was due to the negligence of the engine-driver in not observing the conductor's signals, and stopping the train in time to avert the collision with the other train, so that the plaintiff's right to recover was under the statute only and not at common law, and the damages were reduced accordingly. Rules for the "movement of trains" were held to be plainly intended to govern the conduct of the conductor, driver, and train hands, and non-observance of such rules by others will not necessarily divest such others of the right to recover.——The conviction of the general manager of the Grand Trunk R. W. Co. for disobedience of s. 3 of c. 37 of the statute 16 V. (Province of Canada), which provides for the carrying of third class passengers at a penny a mile, was, on a stated case, quashed by the Court of Appeal, on the grounds that, while the defendant was charged, the findings were that the company committed the offence, and the defendant could not be punished for the default of the company; that the obligation, if any, was the company's, and their official, however important and commanding his position, could not be prosecuted for non-observance thereof, if a prosecution would lie; and that s. 294 of the Railway Act, 1903, whether impliedly repealing s. 3 of the Act of 1852 or not, deprives s. 138 of the Criminal Code of its application: Rex v. Hays, 9 O. W. R. 488. See also Re Robertson and Grand Trunk R. W. Co., 9 O. W. R. 629, noted ante, under MANDAMUS.

Restraint of Trade.]—An appeal by the defendant in Anderson v. Ross from the judgment of Mabee, J., 8 O. W. R. 691, noted ante 52, was allowed by a Divisional Court, on the ground that the covenant of the plaintiff in the partnership articles between her and the defendant was, having regard to the nature of the employment of the husband of the plaintiff in the business of that partnership, wide enough

to include the taking by the husband of such a part as he took in the business of the defendant's competitor: 9 O. W. R. 681.

Sale of Goods.]—The plaintiffs in Royal Electric Co. v. Hamilton Electric Light and Cataract Power Co., 9 O. W. R. 437, sued for the price of two electric generators constructed by them for the defendants, which, the latter asserted, did not answer the requirements of the specifications on which they were to be constructed, and an agreement was entered into between the parties looking to the removal of such defects by the plaintiffs, under which the defendants bound themselves to pay the full contract price, unless, within two weeks after installation, the generators should on a test prove still defective. The defendants had, up to the time of this agreement, been using the generators, and after the reconstruction continued to use them until after the commencement of the action on the 4th May, 1903, although on the 21st September, 1902, they knew that one generator was defective, and on the 10th November, 1902, that the other was also defective. The defendants never notified the plaintiffs of any definite acceptance or rejection of the generators, and were held by Anglin, J., to have by their retention and user, accepted them, and to be forced to seek relief in damages.

Security for Costs.]—The Master in Chambers decided in Toronto Cream and Butter Co. v. Crown Bank of Canada, 9 O. W. R. 543, that, where an action is brought at the instance of the liquidator in the name of a company in liquidation, security for costs will not be ordered, though the liquidator is not in such case liable for costs, if he has on hand assets of the company amply sufficient to meet any costs that may be ordered against the company, and such assets cannot be distributed until the action is determined. But on appeal Mabee, J., held (9 O. W. R. 718) that the defendants, not being creditors or parties in any way to the winding-up proceedings, ought not to be obliged to keep an

eye upon the winding-up proceedings to see that the assets in question would be available for their indemnity, and the action, being one which in the first instance could not have been instituted without the Court's authority, should only be allowed to proceed upon first seeing that, if it fails, the costs of the defendants will be provided for, and it was ordered that the liquidator make provision for the defendants' costs.

Street Railways.]—Explaining and following Myers v. Brantford Street R. W. Co., 31 O. R. 309, 27 A. R. 513, and Robinson v. Toronto R. W. Co., 2 O. L. R. 18, Riddell, J., in Drewitt v. Hamilton, Grimsby, and Beamsville Electric R. W. Co., 9 O. W. R. 427, in giving judgment for the plaintiff, holds that "it is the duty of a motorman operating an electric car upon a public street, if he sees a horse in the street before him so frightened at the car as to endanger the driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether by frightening horses or otherwise he is putting in peril other persons lawfully using the street on foot or with teams,"——The decision of the Court of Appeal in Wallingford v. Ottawa Electric R. W. Co., 9 O. W. R. 495, is to the effect that failure to comply with a regulation requiring the ringing of a gong on approaching crossings contained in the agreement between the municipality and the company under which the railway system is operated, validated by an Act of the legislature, is a non-observance of a precaution which the defendants have recognized as important for the safety of persons using the crossings, which is evidence of negligence on the part of the company. The term "crossing" as used in the agreement was held to include any place along a street occupied by the railway where there is a walk laid for the purpose of enabling foot passengers to cross from one side of the street to the other, and where cars would stop to take up or let down passengers.

Summary Judgment.]—In Grand Trunk R. W. Co. v. City of Toronto, 9 O. W. R. 671, Riddell, J., has decided that a plaintiff may move for summary judgment under Rule 603 at any time so that the motion may be heard before the time allowed for the delivery of his statement of claim has expired, and, it may be, at any time before delivery of the statement of defence.

Vendor and Purchaser.]—An important decision to the conveyancer is that of Mabee, J., in Crabbe v. Little, Moses v. Little, 9 O. W. R. 551. It is held that a provision in a contract for the sale of land that if any objection or requisition be made which the vendor shall be unable or unwilling to comply with, he shall be at liberty to rescind the agreement, may be waived by an attempt to answer such requisition. The attempt here was evidenced by a letter dealing with the objections or some of them, accompanied by a draft conveyance, and by interviews between the solicitors when endeavours were made to arrange matters.——The effect of 3 Edw. VII. c. 19, s. 681, and 54 V. c. 42, s. 35, is held by Anglin, J., in Re Taylor and Martin, 9 O. W. R. 666, to be that under the agreement of a vendor "that he has done no act to incumber" the lands, the subject matter of the agreement, local improvement rates do not constitute an incumbrance which he is bound to remove, but the contrary is held to be the case where his agreement is "to convey the lands freed or discharged from all incumbrances." It is also held that a purchaser is entitled to registration of the probate of a will appointing executors who had executed a discharge of a mortgage to the testator upon the property purchased.

Way.]—In pointing out the necessity in proceedings under s. 110 of the Registry Act, of adhering to the principle that evidence should be given viva voce and not in the form of affidavits, Moss, C.J.O., who delivered the judgment of the Court of Appeal in Re Hamilton Terminal R. W. Co. and Whipple, 9 O. W. R. 463, upon an appeal from an

order under the section named, amending a plan of certain lots by closing up a lane or alleyway in rear thereof, says: "It may be safely said that seldom have the materials presented in a case, which is not interlocutory in its character, furnished less light on the question in issue or been more unsatisfactory in their character." The appeal was allowed on the ground that the railway company, the applicants, had not shewn that the soil of this lane had been parted with by the persons filing or registering the plan, or that they represented the title of such persons. The way in question never having been assumed or accepted by the municipality, it was decided that the applicants could not be aided by the consent of the municipality, even if obtained, which was disputed.

Will.]—A direction by a testator that the residue of his estate shall be divided among the "parties mentioned" in his will, is held by a Divisional Court in Re Miles, 9 O. W. R. 555, reversing on this point the judgment of Falconbridge, C.J., 8 O. W. R. 817, noted ante 56, to include only such persons as were named in the will as beneficiaries.——A direction in a will to executors to pay over one-half the proceeds of the sale of the testator's real estate to his brother or his heirs, and the other half to his wife for life, and after her death to her heirs, as might be directed in her will, coupled with a power to sell the real estate in the lifetime of the wife, one-half of the proceeds to be paid over to her and the other half to be invested and the interest paid to her during her lifetime, the principal at her death to become the property of the brother, was held by Meredith, C.J., in Re Pellett, 9 O. W. R. 587, to confer upon the wife a power only to direct by will what shares her heirs should take, and that in default of appointment by her, and so far as any appointment should not extend, the heirs at law were entitled to take the fund as personalty under an implied gift to them.——A provision in a will by which the testator gave the income of his real and personal property to his widow

during her lifetime and directed that at her decease the rents and profits of his real estate should go to Jane McArthur during her lifetime, and at her decease devising the real estate to her son William Archer McArthur, his heirs and assigns, but providing that if William Archer McArthur should die without issue before his mother the latter should have one-half of the real estate to dispose of as she might think fit, and the other half should go to the Presbyterian Church in Canada, was held by Riddell, J., the widow having died on the 26th March, 1886, and William Archer McArthur on the 3rd November, 1889, under the age of seven years, to create a lapse and intestacy as to one moiety of the real estate, the estate of the infant having become wholly divested. The testator having made his will on the 17th December, 1885, and died on the 25th December of the same year, the gift to the Presbyterian Church was held to be void under the statutes of mortmain, vesting as it did not later than the death of the infant, and for this reason being governed by the law as it stood at that time: Re Archer, 9 O. W. R. 652.

CASES FROM WESTERN CANADA.*

Assessment and Taxes.]—In Re Allingham (N. W. P.), 5 W. L. R. 441, Wetmore, J., refused to confirm a sale for taxes under Ordinance c. 12, 1901, where the application was made within a year from the date of transfer, and the owner's whereabouts could not be ascertained so as to serve him with notice of the application, unless affidavits were filed shewing the regularity of the preliminary proceedings.

Attachment of Debts.]—It is decided by Cumberland, Co. C. J., in Ross v. Goodwin (Man.), 5 W. L. R. 393, that a clause in an affidavit "that the said primary debtor is justly and truly indebted to me in the sum of $48.27 for an account due Thompson and Ross at Nesbitt and assigned to me," is not a sufficient compliance with the requirements of s. 245 of the County Courts Act and form 30, requiring that the affidavit of the primary creditor shall state shortly the cause of action in common, plain, and concise language. It is also decided that moneys in the hands of a County Court clerk paid into Court by a party to proceedings in such Court are not attachable.—This latter ruling is approved by the Court of Appeal in Otto v. Connery (Man.), 5 W. L. R. 403.

By-law.]—An appeal by the plaintiffs in City of Victoria v. Belyea (B.C.), from the judgment of Lampman, Co. C.J., 5 W. L. R. 161, noted ante 278, was allowed by the full Court (5 W. L. R. 428), and the licensing by-law in question was held to have been amended so as to make it applicable to barristers and solicitors.

Chattel Mortgage.]—A curious question presented itself for the decision of the Court of Appeal in Wallace v. Scott

* Short notes of the most important cases in Volume V. of the Western Law Reporter, No. 5, pp. 329 to 448, inclusive.

(Man.), 5 W. L. R. 341. The defendant was the mortgagee of certain chattels, including two mares, which, during the currency of the mortgage, produced four colts, which were sold by the mortgagor to the several plaintiffs. The description in the mortgage contained the words "and also the increase from the mares." The Court (Perdue and Phippen, JJ.A.) held that the rule that the mortgagee takes only an equitable interest in after-acquired property, which can not prevail against a purchaser for value without notice, could not apply to this case, since at common law the legal ownership of the offspring of domestic animals vests in the owner, and when such animals are subject to mortgage in the mortgagee, so that here the mortgagee had by common law the legal ownership of the colts, and by virtue of the intention expressed in the mortgage the equitable right to them also. The use of the words "on foot" instead of the word "alive" in an affidavit verifying a renewal statement, was held not to render such statement nugatory as a non-compliance with s. 21 of the Act, which requires that such affidavit shall state "that the mortgage has not been kept *alive* for any fraudulent purpose."

Execution.]—The proceeds of a sale of land under mortgage, after the payment of two mortgages, were paid into Court. There were executions against the lands registered in the land titles office, and after them other mortgages. The defendant claimed the exemption provided for by the Exemption Ordinance, C. O. 1898 c. 27. Newlands, J., it appearing that if the exemption were allowed the defendant would not benefit, but the moneys would go to the subsequent mortgagees, held that the claim must be disallowed, the right to the exemption being a personal one, only exercisable by the debtor for his own benefit or the benefit of his family: Purdy v. Colton (N. W. P.), 5 W. L. R. 439.

Jury.]—An appeal by the defendants in Griffiths v. Winnipeg Electric R. W. Co. from the order of Mathers, J.

(Man.), 5 W. L. R. 149, noted ante 282, directing that an action for negligence occasioning personal injuries be tried by a jury, was dismissed by the Court of Appeal: 5 W. L. R. 371.

Lease.]—A curious situation was disclosed in Richey v. Rear (Man.), 5 W. L. R. 420. The plaintiff was the tenant of certain lands of the defendant under a lease for a term of years, at a rental of one-half the crop of grain. The defendant having indorsed a note for the plaintiff, on the condition that an additional quarter of the crop for 1905 should be transferred to him as security, it was sought to effect this by making an alteration in the lease in pencil, signed by the parties, to the effect that the defendant should have three-fourths instead of one-half of the grain. Perdue, J.A., held that this writing must be taken, not as an alteration of the lease, but as a memorandum shewing an agreement by the plaintiff to give a quarter of his crop for the year 1905 as a security for the payment of the note.

Lien Notes Act.]—The decision of Macdonald, J., in Smith v. American Abell Engine and Thresher Co. (Man.), 5 W. L. R. 329, is that under s. 4 of the Lien Notes Act a security to be capable of registration in a registry office or land titles office, must not be embodied in an order for a contract for the sale of chattels, but that there is nothing in the Act to prohibit security upon lands being taken separate and apart from the order under which the chattels are purchased.

Life Insurance.]—A promissory note at 3 months was taken by the plaintiffs in Manufacturers Life Ins. Co. v. Rowes (Man.), 5 W. L. R. 405, in settlement of a year's premium payable under a contract of life insurance on acceptance of the policy, which latter provided that in case any note given for premium should not be paid when due the policy should be void, but that such note should, nevertheless, be paid. The Court of Appeal held that the de-

fendant was, in the circumstances, liable for the whole amount of the note, although the plaintiffs' liability ended when the note fell due and was not paid.

Master and Servant.]—The defendant in Copeland-Chatterson Co. v. Hickok (Man.), 5 W. L. R. 353, being already in the employ of the plaintiffs as confidential clerk, was requested to sign and did sign an agreement containing a clause providing that the defendant should not within a year after the termination of his employment engage in competition with the plaintiffs. This provision was held binding by Macdonald, J., because he thought the facts shewed that a non-compliance with the request to sign the agreement would have led to a dismissal, and there was the appointment of the defendant to the position of temporary manager, which, in his opinion, constituted sufficient consideration; but the Court of Appeal reversed this ruling, holding that there was no consideration to support the agreement in this respect, inasmuch as there was no evidence of an agreement that the defendant should be made temporary manager as a result of signing the agreement, and, in any event, this temporary managership was not accompanied by any increase of pay or any terms or conditions, and there was no evidence that a non-compliance would have resulted in a dismissal.——The plaintiff's hiring with the defendants was during "the pleasure of the council at $75 per month." He gave the defendants some 10 days' notice, expiring before the end of the current month, and on its expiration left their service. Newlands, J., held that the hiring was a monthly one to last so long as it pleased the defendants, and that the plaintiff could be dismissed at the end of any month without notice; and that by leaving before the end of the month he forfeited all salary for that month: Sheddon v. City of Regina (N.W.P.), 5 W. L. R. 436.

Miners' Liens.]—It is held by Macaulay, J., in Re Westerberg and Field (Y. T.), 5 W. L. R. 443, that the Miners' Lien Ordinance, 1906, is not retrospective in its operation.

It is further held that, though a contract be made before the Act came into force, a lien is created for work done or materials supplied thereunder after such Act became operative.

Patent for Invention.]—Defects in earlier machines for cleaning seed grain were cured in that of the plaintiff in Mattice v. Brandon Machine Works Co. (Man.), 5 W. L. R. 416, though the machines were otherwise the same in principle, namely, by the addition of a lead tube which conveyed the liquid used to a point underneath the opening in the hopper, so that the liquid and the grain ran through together, resulting in greater capacity. Macdonald, J., held that, in all the circumstances, the plaintiff's machine possessed both novelty and utility in such a degree as to render his letters patent valid.

Promissory Note.]—An appeal by the plaintiff in Moore v. Scott (Man.) from the judgment of Mathers, J., 5 W. L. R. 8, noted ante 118, 120, 121, was dismissed by the Court of Appeal: 5 W. L. R. 381. —— The contention of the plaintiffs in Royal Bank of Canada v. Kirk and Rumball (B.C.), 5 W. L. R. 432, that it is not necessary that notice of dishonour of a note payable on demand be given to an indorser, was overruled by Martin, J.

Receiver.]—The defendant in Town of Emerson v. Wright (Man.), 5 W. L. R. 365, had been appointed by the provincial government receiver of the plaintiff corporation. At the same time were conferred on him all the power and authority theretofore exercisable by the mayor and council, and by the clerk, treasurer, assessors, and collectors. The by-law allowing a discount for prompt payment of taxes fixed the 15th December as the date up to which such payment should be allowed, but the custom had been to allow such discounts up to the 31st December. The defendant, after conferring with the municipal commissioner, decided to follow such custom. Considering his extensive powers, and the fact that the allowance of such discounts was

brought to the notice of the provincial auditor, and that the only body having any power over him was the provincial government, who would doubtless have passed a by-law to legalize such discounts had the necessity been called to their attention, Mathers, J., decided that the plaintiffs could not recover the amount of these discounts. He decided otherwise with respect to a claim for interest in respect of an overdraft at the town's bank owing to the fact that sums drawn were apparently used by the defendant temporarily for his own purposes, and to his delay in making deposits of sums in his hands, raising a presumption that these moneys had also been used by the defendant for his own purposes.

Security for Costs.]—The plaintiffs in Canada Railway Accident Co. v. Kelly (Man.), 5 W. L. R. 412, being described in the statement of claim as a corporation "having its head office in the province of Ontario and a branch office in the city of Winnipeg," the defendant was held by Mathers, J., reversing the order of the Referee setting aside a præcipe order for security for costs, prima facie entitled to such order.

Vendor and Purchaser.]—It is held by Mathers, J., in Grant v. Reid (Man.), 5 W. L. R. 361, that a real estate agent, to whom a person desiring to purchase lands applies, and who thereupon states that he represents the owner and has the lands listed for sale, and through whom a sale is subsequently arranged, is not, in these circumstances, the agent of the intending purchaser so that the mention of such agent's name in an agreement of purchase shall make such agreement binding under the Statute of Frauds, the intending purchaser's name not being mentioned therein.

DECISIONS FROM THE COURTS OF QUEBEC AND THE MARITIME PROVINCES.*

Allotment of Shares.]—The report of Eastern Townships Bank v. Robert (Que.), 2 E. L. R. 525, would read like a familiar tale if it were not for the solemnity of notarial acts, to which the parties seem to have resorted on the slightest provocation. The defendant on the 3rd June, 1905, by a writing under his hand, subscribed for 30 shares of the capital stock of an incorporated company. On the 7th December, 1905, the directors of the company passed a resolution by which they transferred to the plaintiffs as collateral security whatever was owing to the company by virtue of the defendant's subscription, and authorizing the president of the company to sign any authentic deed deemed necessary for the purpose. By deed passed before a notary on the 13th December, 1905, the company, by their president, transferred to the plaintiffs, for valuable consideration, as stated, the asset of $3,000 owing by the defendant by virtue of his subscription. The transfer was served upon the defendant by the notary on the 19th December. The defendant then took a hand in the proceedings, and by a notarial deed dated the 21st February, 1906, declared that he had subscribed for the 30 shares, but that the company had never accepted his offer and had never allotted shares to him, and that he withdrew the offer and repudiated the subscription. This was served upon the company and the plaintiffs on the 23rd February. "I am of opinion," said Mathieu, J., "that the resolution of the directors of the company of date the 7th December, 1905, and the transfer made by the said company to the plaintiffs on the 13th December, 1905, constituted an acceptance by the com-

*Short notes of the most important cases in Volume II. of the Eastern Law Reporter, No. 11, pp. 501 to 576, inclusive, and in Volume III., No. 1, pp. 1 to 44, inclusive.

pany of the subscription made as aforesaid by the defendant, seeing that the company could not transfer said credit without accepting the defendant's subscription (argument of art. 647, C. C.), and that the service of said transfer made on the defendant on the 19th December last was, with respect to the defendant, a sufficient notice on the part of the company of their acceptance of the subscription. . . . On the 19th December, 1905, there was a meeting of the wills of the parties, and consequently there was a contract between the defendant and the company."

Conditional Sales.]—An agreement somewhat similar to that in question in Langley v. Kahnert, 7 O. L. R. 356, 9 O. L. R. 164, 36 S. C. R. 114, came up for consideration in Gault Bros. Co. Ltd. v. Morrell (N. B.), 2 E. L. R. 501. Goods were to be supplied by the plaintiffs to the defendants to enable the latter to establish and carry on a business on their own account. By express agreement, and as one of the conditions upon which the goods were supplied, the property in them was to remain in the plaintiffs until they should be paid for; the defendants to sell the goods in the ordinary course of business. Certain insurance policies were to be assigned to the plaintiffs as security for any indebtedness arising from transactions under the agreement, and the plaintiffs, upon the defendants' default, were to have the right to take possession of and sell the defendants' entire stock, book debts, and assets. Barker, J., held that the agreement was valid and such a one as a court of equity should aid in enforcing, as against the assignees of the defendants for the benefit of creditors; and that, although not filed either under the Bills of Sale Act or the Conditional Sales Act, it was not therefore void as to the goods supplied by the plaintiffs, nor as to the goods procured from other merchants, nor as to the book debts.

Criminal Law.]—The summary conviction in question in Rex v. Janneau (Que.), 3 E.L.R. 5, was made by one of the recorders for the city of Montreal under ss. 207 and 208 of the

Criminal Code. Upon the return of a certiorari its validity was objected to upon the single ground that the evidence was not taken down in writing. An entry upon the record stated that the defendant expressly consented that the depositions should not be taken down in writing. It was held by Davidson, J., in a very concise opinion, that "when the person of the accused and the subject matter of the charge are within the cognizance of the tribunal, a consent, which affects procedure only, will, in the absence of any special circumstances forbidding it, establish a legal waiver," and therefore the consent given by the defendant was effective in law; and a motion to quash the conviction was dismissed.

Damages.]—The important question in Morgan-Smith v. Montreal Light, Heat, and Power Co. (Que.), 2 E. L. R. 513, was as to the measure of damages for breach of a contract. The plaintiffs, a Pennsylvania firm, agreed to deliver to the defendants at Ste. Thérèse, in the province of Quebec, a large quantity of materials and machinery specially prepared by the plaintiffs to be used in certain works of water power development which the defendants proposed to construct at that place. The machinery was shipped by the plaintiffs, and the defendants refused to accept it. Upon the facts Dunlop, J., found that the defendants had repudiated the contract and were liable to the plaintiffs in damages, measured by taking the contract price and deducting therefrom whatever value the machinery left on the plaintiffs' hands might have according to the evidence given—that the plaintiffs were not bound to go out on the market and sell the machinery. The contract price was $42,783.93, and judgment was given for the plaintiffs for $33,347.93. ——Cameron v. Royal Paper Mills (Que.), 3 E. L. R. 35, was an action by the widow of a man who was killed in the service of the defendants to recover damages for his death. It was held by the Superior Court in review that in estimating the damages the jury could not properly de-

duct the amount of an accident insurance effected by himself.

Defamation.]—In Shallow v. Gazette Printing Co. (Que.), 3 E. L. R. 25, an action for libel was grafted upon an action for libel in a curious fashion. The plaintiff sued the defendants for accusing him of blackmail; the defendants pleaded justification, and published a fair resumé of their plea in their newspaper. This was held privileged, Archibald, J., saying: "There is no difference between proceedings filed in courts of justice and arguments made in courts of justice before the court; both are equally accessible to the public; the same principle underlies the publication of both, namely, the interest that the public has in the administration of justice."

Gaming.]—An action upon a promissory note for $5,000 was dismissed because it was shewn that it was made by the defendant in consideration of $1,000 advanced by the real plaintiff to enable the defendant to carry on a bucket shop and also to secure to the real plaintiff a share in the anticipated profits: Allan v. Robert (Que.), 2 E. L. R. 556. It was held by Lafontaine, J., that the consideration for the note was illegal, the nature of the business which it was intended to carry on by means of the money advanced involving the commission of a criminal offence, and at the most the plaintiff's claim rested upon a gaming debt, for the recovery of which no action can be maintained.

Master and Servant.]—In Cameron v. Royal Paper Mills (Que.), 3 E. L. R. 35, Mathieu, J., delivering the judgment of the Superior Court in Review, discusses the cases upon the liability of the master for death of the servant caused by dangerous machinery, where the servant under stress of danger takes the wrong course. It was decided that the question of liability in such circumstances was for the jury, and a verdict having been found against the master, a new trial was refused.

Motoring.]—The Quebec Motor Car Act, 6 Edw. VII. c. 13, nullifies existing, and for the future prohibits, by-laws of municipalities which would locally regulate the speed of motor cars on ordinary highways. Peck v. Ogilvie (Que.), 2 E. L. R. 545, was an action by one Montreal motor millionaire against another to recover damages for injuries sustained in a collision. The plaintiff in his declaration alleged that his car was moving at a very slow rate of speed, while that of the defendant was being driven at an immoderate rate, "far in excess of that permitted *by the by-laws of the locality and* by the general statutes of the province of Quebec." The words italicized were struck out on demurrer, by Davidson, J.

Navigable River.]—The issue in Chauret v. Pilon (Que.), 3 E. L. R. 9, was as to the jurisdiction of the provincial government of Quebec to grant to the plaintiff a water lot upon the Rivière des Prairies, a navigable and floatable but non-tidal stream. The defendant's title as riparian owner was not disputed, and he denied the right of the provincial government to grant a portion of the land covered by the water of a navigable river, and asserted his own right as riparian proprietor. Archibald, J., after an exhaustive review of the principles and authorities applicable, expressed the opinion that the grant to the plaintiff, in so far as it purported to convey land up to the high water mark of the river, conveyed land which belonged to the defendant, and was in so far inoperative and of no effect. The result was that the beach between high and low water mark at the point in question did not pass by the grant from the government to the plaintiff, and was the property of the defendant, and therefore the defendant had no right to complain that the plaintiff had put earth and stone in the water to protect the bank of his property. It also followed that, because the grant to the plaintiff could not convey to him any right to interfere with the navigation of the portion of water conveyed to him, or the anchoring or protection of boats in or upon the property in question, the whole of

the plaintiff's complaint failed with the exception of that which related to a bathing house erected by the defendant, a movable structure made to follow the recession of the water, which, as the evidence shewed, even at low water projected a certain distance into the water lot granted to the plaintiff. There had never been any bornage of the land in question, and, if the description in the plaintiff's grant was to be changed as a matter of law by the substitution of the line of low water for that of high water, the whole description would probably prove to be so vague and uncertain as to render it difficult to ascertain whether anything or what was conveyed by the deed.

Partnership.]—Under a statute which provides that whenever any person makes use in business of the name of another person, the contracts, advertisements, etc., which the person signs, publishes, etc., under that name, shall bear after it the word "registered," it is held by the Court of King's Bench in Gendron v. Denault (Que.), 3 E. L. R. 32, that a person using the name "Gendron, Denault, & Co." is not using "the name of another person," and not subject to the penalty imposed by the statute, which must of course be construed strictly.

Patent for Invention.]—The controversy in Electric Fireproofing Co. v. Electric Fireproofing Co. of Canada (Que.), 2 E. L. R. 532, was in respect of two patents. The Lina Schuler patent was for a new article of manufacture of fireproofing composition composed of phosphate of ammonia and sulphate of ammonia in a solidified form. The Bachert and O'Neil patent was for a process consisting in: first, the enveloping of wood within a closed receptacle, in an atmosphere saturated with aqueous vapour, maintained at about 110 to 200 degrees fahrenheit, to soften and open the pores of the wood; second, producing a vacuum and removing the vapour and water from the wood; third, impregnating the wood uniformly throughout with the fireproofing solution under pressure; fourth, the

drying of the wood at a temperature from 85 to 125 degrees fahrenheit. It was not alleged that the patentees first discovered the fire-resisting properties of sulphate of ammonia or phosphate of ammonia—but that they invented a new and useful combination or mixture of the two, which performs functions that the two constituents would not perform when used individually. This "claim" was upheld by Dunlop, J., in a well considered judgment, in which he pointed out that upon the authorities a mere mechanical mixture is patentable; and he upheld both the composition and the process as novel and useful and therefore valid.

Private Way.]—The defendant, having the right in common with others to use the lane in the rear of his building for ingress and egress to and from it, was held in Meighen v. Pacaud (Que.), 3 E. L. R. 20, to have the right to maintain a fire escape projecting over the lane, about 17 feet above the surface thereof, which did not interfere with the use of the lane by others, and was erected in compliance with compulsory municipal by-laws.

Promissory Note.]—It was held by the Court of King's Bench in Hébert v. La Banque Nationale (Que.), 2 E. L. R. 559, that the addition of the words "with interest at 7 per cent. per annum" to a promissory note after it had been signed by the defendant, was a material alteration, and that the appellant was not a consenting party to it at the time it was made, but that he acquiesced in it afterwards by promising to pay it after examining the note and becoming aware of the alteration, and was therefore not relieved from liability.

EDITORIAL REVIEW.

The Toronto Street Railway Cases.

A recent decision of the Judicial Committee of the Privy Council has given rise to a good deal of wild talk, which seems to shew the very imperfect conception of the average lay mind as to the principles which should govern the decisions of cases in courts of law. The case or cases in question turned upon the construction of written documents, and it is suggested that a court of law in determining the meaning of a contract entered into between the two contracting parties, ought to be guided by the state of public feeling and sentiment as to what construction would be most beneficial for the community, and therefore that a body of Judges located on the other side of the Atlantic, far removed from the locus quo, and entirely ignorant of the way in which popular sentiment would like the case to be decided, is an incompetent tribunal for the disposition of the case.

These objections, which seem so conclusive to the lay mind, as to the unfitness of the tribunal in question, seem, on the other hand, to the lawyer the most conclusive arguments in favour of its fitness. The construction of a document ought to depend on the words it actually contains, construed in accordance with the law of the land. It is needless to tell any lawyer that to import into the construction of a document such considerations as the newspapers seem to think ought to be taken into account, is simply to say that a document should be construed not by what it actually contains, but by what would be most for the interest of one of the contracting parties. Such a contention from a legal standpoint is manifestly so absurd that, even to the lay mind, its absurdity ought to be apparent. To those who think justice is of some importance and that it is something that all members of the community are entitled to,

even industrial corporations, the cases in question seem to demonstrate that it is a very fortunate thing that the court of final appeal is far removed from all local influences, and is in a position to decide cases entirely uninfluenced by any extrinsic considerations, and is necessarily confined simply to the facts as found and the law applicable thereto.

It is too early to offer an opinion on the legal aspects of the case, but it is not at all unlikely that when the reasons of the Judicial Committee of the Privy Council reach us they will be found to furnish such a demonstration of the absolute justice of its conclusions, that we shall be tempted to wonder how any other court could have reached any other conclusion. Such has certainly been the result of many another appeal to that august tribunal.

The Colonial Premiers in England.

There is a noticeable omission in the engagement list of the Colonial Premiers in that no arrangement has been made for their reception by the Inns of Court. The occasion is one of the highest importance and historical permanence. The Inns of Court hold a unique place in the national life, and represent in a way which no other bodies can the matters of legal importance that have an important place in their deliberations. The two chief members of the body are lawyers, so that it would be in accordance with the fitness of things if they were made honorary Benchers of one of the Inns. Sir Wilfrid Laurier was made a Q.C. in 1880, and Mr. Deakin was the first Attorney-General for the Australian Commonwealth. The election of Sir Edmund Barton as an honorary Bencher of Gray's-Inn affords a precedent which might be followed there or at the Middle Temple, where Mr. Choate is on the roll of Benchers. It was the latter Inn which invited the Colonial and Indian Judges at the Coronation to dinner, and the traditions of the Inn would suggest that it should be the host on the present occasion. (*The London Law Times.*)

Law Reform.

The two most important legal topics now discussed in England are the Criminal Appeal Bill and the proposal to make the hearing of appeals in the Court of Appeal by two Lords Justices instead of three, compulsory in certain cases, in order to lessen the block. The latter scheme is not favoured by the Bar, as far as we can learn. The arrears are very large in England, and some remedy has to be found. Should the Criminal Appeal Bill become law, an increase in the number of Judges will be imperative, but even without that the Courts are undermanned, and at least three new judgeships should be created. The argument against that is that the quality of the Bench will be weakened if the number of Judges is increased. We take leave to doubt that. It is satisfactory to reflect that our Ontario experiment of increasing the number of Judges has been satisfactory, there being now practically no arrears either in the Court of Appeal or in the High Court. In the larger sphere of the Dominion we have had practically the system sought to be introduced by the Criminal Appeal Bill in operation here for a good many years, with very good results too.

The Thaw Case as Viewed in Scotland.

The following is taken from a letter received by a friend of "Case and Comment" in Rochester, New York, from a lawyer in Scotland who has had long experience in criminal law. He compares American and Scottish trials with particular reference to the Thaw case as follows: "It is a great case, but not nearly so great as your American methods of procedure. Here the Crown case is heard right away. Both parties have to shew their hands a week before the trial by lodging final lists of witnesses. No new ones are allowed to go into the box. Then the case goes on for the Crown in an orderly, straightforward manner. When the prosecution is done, rebutting evidence cannot be introduced. Then the defence comes along on the same lines. Here the Judge goes into all the facts as well as the

law. With you, as I understand, the jury are sole judges of the facts, and are left to their own reflections after the counsel have spoken and the Judge has delivered his charge. Speaking as one who has had many criminal cases through his hands, I am firmly convinced that our methods of straight fighting are superior to your elaborate system. You make too much of the counsel. It is really Jerome's and Delmas's acts that are on trial, with Thaw's future as a kind of by-product of the experiment. This, I think, is wrong. It is the facts that are great or little, and the more room you leave for diplomacy and tactics the more you swell the lawyers' heads and belittle the law. On the other hand, your system of summing up seems to me far superior to ours. Our Judges, especially some of our local sheriffs (similar to Judges of minor courts in America), go far too much into the facts, and, putting themselves in the jury's place, practically dictate the verdict. Of course, strong-minded jurors sometimes take their own course in spite of this dictation. I'm a loyal Briton in most things, but I often long for your American summing-up methods. As for the rest of your system, to the devil with it, for a cumbersome device for wasting decent men's time and swelling lawyers' heads."

Recent American Decisions.

Insurance.—The right of a person to procure insurance on his own life and assign the policy to another who has no insurable interest in the life insured, is sustained in Rylander v. Allen (Ga.), 6 L. R. A. (N.S.) 128, provided it be not done by way of cover for a wager policy.

Master and Servant.—The immediate bringing of an action by a servant wrongfully discharged during the term for which he was engaged is held, in Howay v. Going-Northrup Co. (Wash.), 6 L. R. A. (N.S.), 49, not to prevent a recovery for the whole unexpired term, if the trial does not take place until the term has expired.

Negligence.—The liability of the proprietor of a private sanitarium for negligence of a nurse, causing injury or suffering to a patient, is sustained in Stanley v. Schumpert (La.), 6 L. R. A. (N.S.) 306.

Perpetuities.—The rule against perpetuities is held, in Robinson v. Harris (S. C.), 6 L. R. A. (N.S.) 330, to prevent children born after the death of testator from taking an interest in an estate under a will giving it to a certain person and his children for life, since the possibility of the birth of children after the expiration of twenty-one years prevents children born within that time from sharing in the estate.

Railway.—The right of persons in charge of a railway train to presume that a child on the track will appreciate the danger and get out of the way of the train is denied in Southern R. Co. v. Chatham (Ga.), 6 L. R. A. (N.S.) 283.

Will.—Where a will makes inadequate provision for a helpless child without property, and there is evidence of undue influence, it is held, in Meier v. Buchter (Mo.), 6 L. R. A. (N.S.) 202, that the Court cannot force a verdict to sustain the will in favour of other children happily circumstanced, and that the question of the validity of the will should be submitted to the jury.

PERIODICALS AND PAMPHLETS.

Dominion of Canada Labour Gazette (April, 1907):—"The Industrial Disputes Investigation Act;" "False Representation to Induce Immigration;" "Mission to England of the Deputy Minister of Labour;" "Dominion Legislation affecting Labour;" "Investigation re Child Labour in Ontario;" "Annual Convention of Canadian Forestry Association."

Harvard Law Review (May, 1907):—"Business Policies Inconsistent with Public Employment," by Bruce Wyman; "Transfer of Land in Old English Law," by Paul Vinogradoff; "Constructive Trusts Based upon the Breach of an Express Oral Trust of Land," by James Barr Ames.

Albany Law Journal (April, 1907):—"Centralization by Construction and Interpretation of the Constitution," by J. M. Dickinson, Chicago; "Some Recent New York Decisions concerning the Insolvency of Building Loan Associations," by Alfred L. Becker, Buffalo; "The Law and Industrial Inequality," by George W. Alger, New York.

Case and Comment (Rochester, N.Y., April, 1907):—"Servant's Nonfeasance as a Crime;" "Absurd Length of Trials;" "Issue of Insanity of Accused Person;" "A Publicity League;" "Suggestions as to Limits of the Treaty Power."

Civil Law Notes (Madras, January, 1907):—"Extent of the Power of Reversal in Appeals from Decrees," by K. S. Ramaswamy Sastry; "The Theory of Adoption according to Hindu Law," by Lala Sangam Lal.

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NATIONAL TRUST COMPANY

—LIMITED.—

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No. 18 TO 22 KING STREET E., TORONTO.

CAPITAL (Paid-up), $1,000,000. RESERVE, $450,000

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MONEY TO LOAN on First Mortgage Security on City or Farm Property

W. T. WHITE,
GENERAL MANAGER

THE
CANADIAN LAW TIMES.

JUNE, 1907.

THE STATUTES OF ONTARIO FOR 1907

THE statutes passed at the recent session of the Ontario legislature constitute a bulky volume of over 800 pages, which has been issued with commendable promptitude.

Chapter 1, which sets forth the annual supply voted by His Majesty's lieges for the carrying on of the government of the Province, is an instructive comment on the progress and development of provincial affairs since the Confederation Act took effect in 1867. In the year which followed confederation the total amount of supply voted was $1,940,-113.12. At the present session the amount is no less than $7,294,382.28.

Comparing the items voted for the different services, we find the following among other differences:—

	1868.	1907.
Civil Government	$122,873 29	$548,392 00
Legislation	91,950 00	225,400 00
Administration of Justice ...	200,365 26	625,402 00
Education	349,065 00	1,439,968 27
Hospitals, Asylums, Prisons, and Public Buildings	192,501 87	2,242,093 03
Public Works	224,972 00	198,750 00
Colonization and Mining Roads	.....	333,211 00
Expenses of Crown Lands...	.....	538,700 00
Miscellaneous	23,000 00	271,175 30

The increase in population has not by any means kept pace with this great increase of expenditure; for while the

population of Ontario in 1871 was 1,620,851, we find that in 1901 it stood at only 2,182,947, or an increase of about one-third. Thus, assuming that the population in 1868 stood at the same figure as in 1871, the expenditure was less than $1.20 per head; whereas at the present time it appears to be over $3.30 per head.

It will be seen that the cost of civil government and education has more than quadrupled, the cost of administration of justice has tripled, and of legislation has more than doubled: but the greatest increase of all is to be found in the expense of hospitals, asylums, prisons, and public buildings, which is now more than ten-fold what it was in 1867.

Chapter 2 is a re-enactment in an amended form of the Interpretation Act (R. S. O. c. 1). The principal variations which we note are in s. 7 (32-4), which we see are taken from R. S. C. c. 1, s. 31 (*c*, *e*, and *f*), and in s. 7 (46, 47, 48), which are also taken from R. S. C. c. 1, ss. 19, 20. They deal, however, in a more ample manner with similar provisions in the former Interpretation Act, s. 8 (46, 47). Section 8 (59) of the former Act—"Nothing in this section shall exclude the application to any Act of any rule of construction applicable thereto, and not inconsistent with this section—" we observe, is omitted from the new Act. Clauses 30 and 31 of s. 8 of the former Interpretation Act (R. S. O. c. 1) are now transferred to an Act respecting Fines, Penalties, and Forfeitures, c. 26, to be hereafter mentioned.

Chapter 3 is a re-enactment of R. S. O. c. 2, in a slightly amended form, and relates to the printing and distribution of the statutes. The principal change is in the omission of specific directions as to the type, paper, and mode of printing and binding, and leaving all such details to the order of the Lieutenant-Governor in council to be approved by resolution of the Assembly. The clauses in the former Act requiring the King's Printer to distribute the statutes are omitted in the new Act, possibly as being a matter of mere official routine.

Chapter 4 is a consolidation of the Voters' Lists Act (R. S. O. c. 7), including the various amendments which have been made therein since 1897. One important change may be noticed in s. 2 (5), whereby the former concurrent jurisdiction of senior and junior District and County Court Judges is taken away, and the junior is now only authorized to act in case of the illness or absence or at the request of the senior Judge.

Section 5 has removed the exception of the town of Niagara Falls from the operation of part I. of the Act, and part II. is now made applicable to all cities, and not merely to those having a population of 100,000 or over, as was formerly the case. Part I. regulates, as in the former Act, the making of alphabetical lists of voters and copies thereof.

The scheme laid down by s. 6 is that the voters' lists are to be made in three parts. The first part to contain names of voters who are entitled to vote at both municipal and provincial elections; the second part to contain the names of persons entitled to vote only at municipal elections; and the third part the names of persons entitled to vote only at provincial elections.

But by s.-s. 16 the third part is to be omitted as regards cities: this sub-section is intended possibly to preserve in a somewhat altered form the provisions of s. 3 (2) of the Manhood Suffrage Act, R. S. O. c. 8, which clause is omitted from the re-enactment of that Act presently to be referred to. Voters' lists for cities, therefore, are to be in only two parts, and contain only the names of persons entitled to vote (1) at both municipal and provincial elections, and (2) at municipal elections only.

Sub-section 16 of s. 6, which deals with the time when the list is to be deemed finally revised, is a variation from s.-s. 16 of s. 6 of the former Act, and it may be open to doubt whether it has precisely the same effect. The former sub-section appears to be preferable.

In s. 9 we notice that the amendment made by 62 V. c. 3, s. 2, to R. S. O. c. 7, s. 8, requiring three copies of the voters' list to be sent to each member of the county council, has been dropped.

An addition has been made in s. 14 by s.-s. (5), which enables affidavit evidence to be used before the Judge on applications to have persons entered on the list. It may be well to note that in s. 14 an important clerical error occurs in the second line, where the word "order" is used instead, probably, of the word "voter." It is possible that the mistake is sufficiently cured by the provisions of the following section 15.

In s. 19 we note that a clause (4) has been added to the effect that the entry of a person's name on the last revised voters' list is to be prima facie evidence that he is a British subject, and 21 years of age. The full statement of alterations made by the Judge in the list, being form 16 of the former Act, is no longer required, and in lieu a short certificate appended to the roll as revised and corrected is substituted. The list may be corrected by striking off the names of persons dying before the nomination day, but in such case the publication of notice of the sitting of the Court for that purpose is now expressly dispensed with. A change is made by s. 28 in the remuneration payable to the clerk for serving notices.

Section 41 is new, and, as it strikes us, a very reasonable provision, to the effect that where a person is ordered to be entered as a voter at municipal elections, the Judge is also to add to the roll the necessary particulars required by the Assessment Act, so that such person may not have the privilege of voting without also incurring a liability to pay taxes.

Part II. deals with ward lists, and contains apparently no variation from the previous law, and Part III. with lists in territories without municipal organization. In this part a new provision occurs in s. 57, which enables the Lieu-

tenant-Governor in council to appoint enumerators to prepare voters' lists for those parts of the province, and these enumerators need not necessarily be either sheriffs or police magistrates. With this exception no substantial change appears to be made in this Part from the pre-existing law.

Before parting with this statute, we may note that the references to the former statute at the end of the sections are not in all cases complete. For instance, in s. 6, after s.-s. (14) should be noted "R. S. O. c. 7, s. 6 (1-14); after s.-s. (15) the word "new" and "see R. S. O. c. 8, s. 3 (2);" after s.-s. 16 "R. S. O. c. 7, s. 6 (16);" after s. 15 (2) "see R. S. O. c. 7, s. 14 (7);" and after s.-s. (3) "1 Edw. VII. c. 2;" after s. 19 "R. S. O. c. 7, s. 16;" after s. 72 "R. S. O. c. 7, ss. 46, 47." These notes are useful not only for the purpose of tracing the origin of the section, but also in finding cases bearing on the section, and we hope that they will not be omitted from the new consolidation of the statutes.

Chapter 5 is a consolidation of the Manhood Suffrage Act, R. S. O. c. 8, and the various amending Acts. It also appears to contain some new provisions some of which apparently are due to some of the changes effected by the new Voters' List Act, already noted.

Section 1 limits the application of the Act to cities and towns having a population of 9,000 or over by the last Dominion census.

By s. 5 a change is made in the constituents of the boards of registration in some localities. Among other changes, the former special provisions as to Hamilton, Ottawa, London, and Niagara Falls, have been omitted, and the boards are hereafter to be constituted in the same way in all towns and cities, except Toronto, Fort William, and Port Arthur, as to which places special provision is made.

By s. 6 the provision as to the appointment of a chairman made by R. S. O. c. 8, s. 12, as amended by 61 V. c. 4, s. 4, has been changed, and the Lieutenant-Governor in

council may appoint the chairman, and the provision enabling the board itself to appoint one has been omitted.

By s. 19, which is new, provision is made for the registration of persons who are sick or absent. Section 20 makes some slight change in the constitution of the board of appeal.

Section 45, which repeals R. S. O. c. 8, has a saving clause preserving that Act in force in municipalities to which it applied, but to which the present Act does not apply, where an election is to be held before the 1st January next, so far as such election is concerned. This Act also omits references to some of the sections of the R. S. O., e.g., s. 2 (1, 2), should refer to R. S. O. c. 8, s. 4 (2, 3); s. 6 (6), should refer to R. S. O. c. 8, s 19; s. 7 should refer to R. S. O. c. 8, s. 12; and s. 8 (1, 2), should refer to R. S. O. c. 8, s. 13. The omission of these references might lead a reader to suppose that these sections are altogether new.

Chapter 6 is an amendment of the Election Act (R. S. O. c. 9), the principal change being effected by s. 1, which enables clergymen, and teachers of high and public or separate schools, who within three months prior to an election cease to reside in the electoral district where they are registered as voters, to exercise their franchise in such district if still resident within the Province, and not entitled to vote elsewhere. Temporary absence on militia duties is included among the causes of temporary absence which do not disentitle a person to be entered on the assessment roll, or voters' list, within s. 11 of the Election Act.

A change is made in ss. 8 and 9 of the Election Act, which may be noticed. Those sections required voters to have been resident within the Province 9 months, and in case of manhood suffrage voters, 12 months, next preceding the election; it will now suffice if the voter have resided for these respective times within the Dominion of Canada.

Chapter 7 is the Act which authorizes the increase of the salaries of the Provincial Ministers of the Crown.

Chapter 8 makes a provision for the payment out of sums appropriated, and for the due accounting therefor in cases where no other provision is made.

Chapter 9 is entitled "the Supplementary Revenue Act," and imposes a tax for the benefit of the province on the excess of the annual profits of all mines over and above $10,000, and "mines" include all mines of metalliferous ore or other solid mineral substance other than limestone, marl, peat, clay, building stone for ornamental or decorative purposes, or non-auriferous land or gravel. The Act also imposes a duty of 2 cents per 1,000 ft. on natural gas. Why coal oil should not also receive some attention of this kind will probably occur to some people as deserving of consideration.

Chapter 10 is a welcome consolidation of the Succession Duty Act (R. S. O. c. 24) and the various amendments made therein, which had become so involved that it was a difficult task to make out what really was the law. In this Act, as in others already noted, we find that the omission of references to the former Acts makes it difficult to say whether sections having no references are altogether new or not. We note, among what appear to be additions, that in the descriptions of property dutiable, money received under a policy of insurance effected by any person on his life is included: see s. 6 (1) *f*. We also note that changes are effected by s.-ss. (3), (5), and (6) of that section, whereby grandfathers and grandmothers are now placed on the same footing in regard to payment of duty as fathers or mothers. A provision of s. 8 (10) of the former Act made personal representatives who distribute any part of an estate without bringing it into the province, personally liable for the duty—subject to the proviso that it should not apply to payments made to persons domiciled out of the Province, out of assets situate without the Province. This provision seems to have been omitted from the present Act; but its omission will not relieve personal representatives from liability, because they are still required to give a bond with

two sureties for the due payment of duties: see s. 7 of the new Act. Provision is also made for imposing an additional duty in respect of property not disclosed in the original inventory filed at the time of the grant of probate or administration.

A new procedure is prescribed where the Treasurer is dissatisfied with the value as sworn to by the personal representative, either for an inquiry before the Surrogate Judge, or as formerly by an appraisement by the sheriff of the property in question: see s. 8: and for the valuation of annuities, etc.: see s. 9. New provisions appear also to be made as to the time for payment of duties in respect of expectant interests: see s. 12. Power is given to the Surrogate Judge to extend the time for payment of duty: see s. 13.

We notice that the provision in 62 V. (2) c. 9, s. 13, forbidding foreign personal representatives to assign stock in this Province until duty paid, and making corporations allowing stock to be so transferred liable for the duty, is not included in the present Act: and it would seem that the power given to the Treasurer to register cautions, given by 62 V. (2) c. 9, s. 9, is also omitted.

Chapter 11 makes an important change in the Free Grants and Homesteads Act (R. S. O. c. 29). By that Act the Lieutenant-Governor in council was empowered to remit sums due to the Crown by bona fide settlers in free grant townships, "who were in occupation of their lands on the 2nd March, 1872;" but this limitation has now been struck out, and the power of remission is extended in favour of all settlers on such lands.

Chapter 12 extends the time for filing applications for free grants by persons serving in the late South African war, or in active service of the Canadian Militia in the years 1865, 1866, or 1870, or their representatives, to the 1st January, 1908.

It seems somewhat unfortunate that when making the extensive amendments to the Mines Act, 1906, effected by c. 13, the whole Act was not re-enacted, so that we might have the whole statute law on this somewhat difficult and important subject embraced in one statute; in the new consolidation of the statutes, however, this will be shortly effected.

By s. 1 a very much enlarged definition is given to the word "mine" in the principal Act. Sundry verbal amendments are effected by ss. 2-5. By s. 6 the procedure before the mining commissioner is regulated. And by s. 7 a new provision is made regarding production of documents and the trial of matters before the mining commissioner; and s. 21 of the principal Act is repealed; and ss. 8 and 9 make consequent amendments in ss. 22, 26, and 34 of the principal Act. On appeal to the Divisional Court from a decision of the mining commissioner notice of appeal is to be filed in the High Court, and also served on the commissioner within 15 days after the filing of the order sought to be appealed from. The amendment does not appear to take into account the fact that the principal Act permits an appeal to be brought not only within the 15 days from the filing of the order, but also "within such further time as the mining commissioner or a Divisional Court or Judge thereof may allow." Strictly read, we fear the amendment might have the effect of making any appeal after the 15 days nugatory. By s. 11 an appeal from the Divisional Court to the Court of Appeal is now given, but only in case the Divisional Court reverses or varies the judgment of the commissioner; an unsuccessful appellant to the Divisional Court would therefore have no appeal.

More ample powers are given by s. 12 to mining recorders and to the mining commissioner for the summary disposition of questions between licensees; and no case is to be removed from these officers by certiorari.

Section 13 repeals s. 58 of the principal Act and adds s. 158*a*, which covers in a more ample way the claims which

may be recorded, and provides the procedure to be followed where claims are rejected or disputed.

Section 14 is a somewhat novel mode of legislation; it strikes out s. 59 from the principal Act, and directs it to be inserted again after s. 158, as 158*b*, and directs 158*b* to be amended by adding certain words.

Section 51 deals in a similar way with ss. 72 and 61. Such a mode of making amendments, it is to be hoped, will not be generally followed.

Sections 67, 68, 69, 70, and 71 of the principal Act, which relate to the inspection of claims, are amended by ss. 17-27 of the new Act.

Section 24 enables the commissioner to receive new or additional evidence on appeals. He may also order security for costs to be given; and he is not to be bound to give a decision in favour of any party except where the real merits or substantial justice so require. By s. 25 provision is made for allowing substitutional service of notice of appeal to the commissioner, and requires a notice of appeal to contain the appellant's address for service within 5 miles of the mining recorder's office, and provides for proceedings in case of default: ss. 26-28 make verbal amendments in ss. 79, 84, and 91.

Section 29 provides for the staking of claims to mines discovered by public officers appointed under the Mining Act for the benefit of the Crown, and in this way the discoveries made by the Crown's servants will enure to its benefit.

By ss. 30-32, sundry verbal amendments are made in ss. 138, 117, and 118, of the principal Act.

Section 33 adds some clauses to s. 119 enabling the commissioner to deal with the case of injuries to surface rights by prospectors, and makes the compensation awarded to the surface owner, under s. 119, a lien upon the mining rights held by the party doing the injury.

Section 34 amends s. 131, relating to the prospecting claims, by excepting lands already under staking record, or under permits, or withdrawn from exploration.

By s. 35 verbal amendments are made in s. 132, and new provisions are made as to the manner and time of staking claims by s. 36, which amends ss. 133 and 134 of the principal Act. Sections 135 and 136, which deal with the rights of prospectors on lands open to prospecting, and the planting of pickets, are also amended by s. 36.

A somewhat stricter wording has been given to s. 139 by s. 37, as to the number of claims which may be staked in a year.

Section 140 of the principal Act, which provided that an application to record a claim should confer no right until the claim was recorded, has been repealed by s. 38, and it is now provided that, even after claim recorded, until patent, the claimant is to be deemed only a tenant at will of the Crown. The procedure to be followed by a licensee desiring to obtain an exclusive possession of a mining area for the purpose of prospecting prescribed by s. 141 has been amended by s. 39. The time limit for procuring a working permit may in certain cases be extended: see s. 40. Appeals are also provided for in case of disputed claims to working permits: see s. 41. And s. 41 also provides for the staking of claims by the holders of working permits. Verbal changes are made by ss. 42 and 43 in ss. 145, 149, and 156. The form of affidavit on filing a mining claim prescribed by s. 157 is amended by s. 44 so as to purge the applicant's conscience as to prior claims. Section 45 adds a clause to s. 159 declaring that no licensee is entitled to any interest in an unpatented claim staked out and recorded by another licensee, unless his interest is disclosed and his evidence is corroborated. The amendment is curiously worded, and may be found difficult of interpretation.

By s. 46 further provisions are made for recording judgments, orders, and decisions affecting mining claims, and also certificates of lis pendens

Verbal amendments in ss. 161, 162, 163, 164, 72, and 61, are made by ss. 47-51. The effect of the amendment to s.

61 is to make the decision of the mining commissioner as to the sufficiency of work on a claim, final.

The provisions of the principal Act regarding forfeitures have been amended by the repeal of s. 167, and the addition of a new section enabling the licensee to prevent forfeiture by obtaining a special renewal license: see s. 53.

The removal or defacing of stakes, as a cause of forfeiture, is now limited to cases when it is done by a licensee for any purpose of fraud or deception or for any improper purpose: see s. 52. Verbal changes are made in ss. 165, 166, and 181, by s. 54, and in s. 182 by s. 55.

Section 56 introduces a new provision requiring party walls at least 15 feet thick to be left between mines.

Verbal amendments are made in ss. 214 and 219, by ss. 57, 58; and s. 59 makes amendments in the tariff of fees. Some changes in the forms are made by ss. 60-64.

The next Act we come to is c. 14, passed for the promoting of the smelting industry in this province, and providing for a government bounty to metal refiners.

Chapter 15 is in the nature of a private Act and confirms certain patents issued for sub-aqueous lands in Cobalt and Kerr Lakes.

Chapter 16, an Act for the Improvement of Highways, will be welcomed by motorists and others using the public highways of the province, to which in the past too little attention has been paid. $1,000,000 is set apart to be expended in aid of counties constructing and improving roads in a manner to be approved by the Lieutenant-Governor in council.

Chapters 17, 18, 19, and 20, respectively, deal with (1) colonization roads; (2) the Temiskaming and Northern Ontario Railway; (3) the transmission of electric power to municipalities; and (4) agricultural societies—and do not seem to call for any particular notice here.

Chapters 21, 22, are of a private character.

Chapter 23 is the Statute Law Amendment Act, and covers, as usual, a multitude of amendments to various statutes, not all of which need here be referred to.

Selecting these which appear of most general interest, we may call attention to s. 2, enabling trustees to invest in Manitoba real estate. Section 4, which entitles justices of the peace to use the town hall for hearing cases, where no other suitable place is provided. Section 5, which makes provision for the case of the illness of a police magistrate by giving any other police magistrate in the county power to act for him.

Section 8 appears to be a very important amendment, inasmuch as it enables the High Court to pronounce a decree of nullity in the case of the marriage of a minor under 18, without consent of parents, where no cohabitation has taken place. Here it is to be feared, as in some other enactments, it will be found that the legislature has undertaken to do what the ecclesiastical authorities of some at all events of the Christian denominations will consider it had no power to do. A marriage of a minor of the age of puberty, without consent of parents, though irregular, is ecclesiastically valid, and it would seem that it is also legally valid, as was held in Regina v. Roblin, 21 U. C. R. 352. The marriage in question in that case was subsequently dissolved by Act of Parliament: see 32 & 33 V. c. 75 (D.), statutes 1870, p. 5; and see the recent case of Ogden v. Ogden, [1907] P. 107.

It will no doubt, therefore, become a question whether this section is not in effect legislating on the subject of divorce, which by s. 91 (26) of the B. N. A. Act is exclusively within the jurisdiction of the Dominion Parliament. This consideration has probably induced the legislature to provide that the section shall not come into force until so declared by the Lieutenant-Governor in council, and we should not be very much surprised if the section were never to take effect.

The bungling amendment made to the Solicitors' Act by 1 Edw. VII. c. 12, s. 15, respecting costs where the solici-

tor of the party to receive them is paid by salary, we see is repealed by s. 12, and by s. 13 a new and more explicit provision is made which will probably have the desired effect. The former Act made the mistake of assuming that costs in an action are payable directly to the solicitor, and not to his client. By s. 17, the lien of a keeper of a livery stable or boarding stable on horses boarded, or vehicles left at his stable, may now be enforced by sale.

Section 50, which deals with the subject of copyright acquired for the purpose of public school readers, does not strike us as being particularly well drawn. It seems intended to divest the late publishers of the readers of such rights in favour of any other publishers to whom the right of publication may be transferred by the Government; but we shall not be surprised if another Act is required to effectuate what is intended. As the section at present stands, the new publishers might acquire the copyright rights absolutely, whereas, we suppose, it is really intended that they should also hold them as trustees for His Majesty, as the former publishers are declared to do.

Chapter 24 enables Weekly Court or Judge's Chambers business arising in the counties of Renfrew, Leeds, Lanark, Grenville, Carleton, Dundas, Russell, Stormont, Prescott, and Glengarry, to be taken at the Weekly Court at Ottawa, if the solicitors for all parties reside in any of those counties.

Chapter 25 erects the new judicial district of Sudbury, the town of Sudbury being the district town. The Act is to come into force at a day to be named by the Lieutenant-Governor in council.

Chapter 26 consolidates R. S. O. cc. 108, 109, regarding the remission and appropriation of fines, penalties, and forfeitures, and also incorporates in substance the provisions of the former Interpretation Act (R. S. O. c. 1) s. 8 (30-31) respecting the recovery of fines, penalties, etc., which, as we have pointed out, have now been omitted from the Interpretation Act, where they seem to have been somwhat out of place.

Chapter 27 is intended for the relief of mortgagors and to enable them to have the benefit of agreements to accept a lower rate of interest than that reserved, after the mortgage matures as well as before, on giving three months' notice of payment or paying three months' interest at the lower rate in lieu of notice. If the mortgagor fails to pay pursuant to notice, the higher rate will be recoverable notwithstanding the notice, unless the mortgagor pays not only the interest at the lower rate to date of payment, but also "three months' interest in advance," but at what rate this three months' interest is to be paid is not stated.

Chapter 28 amends the provision of the Trustee Investment Act (R. S. O. c. 130), s. 5 (1), relating to investments in debenture stocks of certain companies, by authorizing also deposits of trusts funds with such companies. Its wording is somewhat clumsy.

By c. 29 sundry amendments are made to the Registry Act — among the number, one authorizing the registration of liens against railways in the general register, the registration without local description (see s. 3); another providing that plans of subdivision are not to have any two lots designated by the same number, letter, or word, notwithstanding they are on opposite sides of the same street, or in different streets, or in different blocks.

Chapter 30 makes sundry amendments to the Land Titles Act (R. S. O. c. 138). Inter alia, it authorizes the Lientenant-Governor to appoint one or more barristers as examiners of title, to whom the Master of Titles is empowered to refer particular cases, with power to him to act on the report of the referee, a provision adopted apparently from the English Land Transfer Rules, 1903. The phraseology of s. 26, which specifies the liabilities to which registered land is subject, and which seems to have been originally taken from the Quieting Titles Act, has been corrected so as to include all taxes, and not merely those for "the current year," an amendment which effectuates the original intention of the legislature. The death of a person after he

has signed a discharge of an incumbrance, but before its registration, is expressly declared not to operate as a revocation of the discharge (see ss. 5, 6). Section 15 deals with the registration of easements where the servient tenement is unregistered land and the dominant tenement registered land, or vice versa.

Section 16 makes further provisions respecting the registration of covenants or conditions running with or annexed to the land, and s. 17 for the summary cancellation of void or erroneous entries on the register.

Section 19 offers further facilities for the introduction of the Act in counties, cities, and towns where not less than twenty ratepayers desire it owning land therein of an aggregate value of $400,000.

Chapters 31, 32, and 33 deal respectively with the subjects of (1) The Surveys Act, (2) licensing of stationary engineers, and (3) pawnbrokers.

We now come to what may be fittingly described as the pièce de resistance of the session, viz., c. 34, which is intituled "The Ontario Companies Act," and consolidates the provisions of no less than 28 statutes. The Act covers nearly 75 pages, and it will not be possible to do more than touch on some of its more salient features. In the first place, it does away with the varying modes of incorporating companies which formerly prevailed, which is an excellent thing, though future generations of lawyers will have to struggle with the effects of the diversities of the former law. The Act, however, holds out to existing companies inducements to come under its provisions.

Part I. (ss. 1-26) provides the method of incorporation, which is to be by letters patent; it prescribes what petitions therefor are to contain, where there is a share capital, and where there is not. It gives the Lieutenant-Governor a discretion as to the name. It provides for the creation of capital by companies incorporated without capital and for the amalgamation of companies and reincorporation

and extension of the powers of existing companies. Also for obtaining authority to vary, increase, or decrease capital, and limiting or increasing a company's borrowing powers. It sets forth in detail the powers of incorporated companies (see ss. 17, 18), and makes provision for the forfeiture or revocation of charters of incorporation (ss. 21, 22). It also contains a provision that where a company carries on business after its shareholders or members have been reduced below five in number for a period of six months, each member knowing thereof is to become personally liable for the whole of the debts of the company contracted during the time it so carries on business; shareholders may protect themselves from this liability by serving a protest on the company and giving notice to the Provincial Secretary (see s. 23). The terms on which charters may be surrendered are laid down in s. 24; and s. 25 empowers the Lieutenant-Governor in council to terminate the existence of companies incorporated otherwise than by letters patent.

Part II. of the Act (ss. 27-33) is confined to provisions respecting the names of corporations, and the use of the word "limited" in connection therewith, and makes provision for changing names either voluntarily or by compulsion.

Part III. (ss. 34-45) regulates meetings of companies and proceedings thereat.

Part IV. (ss. 46-72) makes provision respecting shares, transfer thereof, making calls thereon, forfeiting shares for non-payment of calls; the issue of share warrants, and the rights of holders thereof; the rights and liabilities of trustees and mortgagees of shares; joint holders of shares; the extent of liability of shareholders and their right to set up set-off.

Part V. (ss. 73-78) deals with the questions of borrowing, and the issue of debentures and preference shares, and the redemption or conversion thereof.

Part VI. (ss. 79-94) regulates the powers and liabilities of directors and their remuneration. Section 92, which

empowers them virtually to convert dividends into capital, may be noticed as something new.

Part VII. (ss. 95-105) regulates the issue of prospectuses, and imposes liabilities on directors for false statements, the provisions of Mr. Hoyle's Act of last session (6 Edw. VII. c. 27) being here incorporated.

Part VIII. (ss. 106, 112) regulates the procedure for allotting shares offered for public subscription, and renders nugatory all agreements to waive the statutory conditions. It also imposes certain restrictions on the amount of business, and requires a return of the allotment of shares to be made to the Provincial Secretary, and provides for the holding of a general meeting not less than one month nor more than three months after the commencement of business, and specifies the information to be laid before the shareholders.

Part IX. (ss. 113-130) makes provision for the books to be kept, and imposes penalties for false entries, and provides for rectification of errors therein, and regulates the inspection of books, penalties for false returns; and empowers the High Court to appoint an inspector of the affairs of a company, and also provides for auditing the company's books, and defines the rights and duties of auditors.

There is also a second Part IX. (ss. 131-138), regulating the annual returns to be made, and the fees payable to the government; also the mode of proof of by-laws, and dispensing with the corporate seal in certain cases, and enabling shareholders to be served by the company through the post-office, and enabling shareholders to consent in writing to by-laws requiring two-thirds vote of shareholders.

Part X. (ss. 139-146) contains the special provisions respecting mining companies; mining shares may still be authorized to be issued at a discount—a concession, we presume, to the prevalent gambling spirit. Special provision is also made for the sale of mining shares for default in payment of calls.

Part XI. (ss. 147-153) contains special provisions respecting trust companies.

Part XII. (ss. 154-168) appears to be new, and regulates companies operating municipal franchises and public utilities (we may note here that in a later Act, c. 37, there is a legislative definition of what is meant by a "public utility"); and prescribes the additional information to be furnished on the application for incorporation or for supplementary letters patent; also for the additional returns to be made by such companies, and for the inspection of their books.

Part XIII. (ss. 169-170) extends to all companies, for the purposes of their undertakings, powers of expropriation, to be exercised as prescribed by the Ontario Railway Act.

Part XIV. (ss. 171-208) includes the provisions of the former Winding-up Act (R. S. O. c. 222). It provides, as does the English Act, for the voluntary and also the compulsory winding-up of companies, but, unlike the former Winding-up Act, it empowers the compulsory winding-up to be made in the High Court instead of a County Court. Section 203 empowers the Lieutenant-Governor in council to make rules of practice, a power which it is to be hoped will be duly exercised. The Act, it may be noted, and consequently the winding-up clauses, would appear to be only applicable to companies incorporated by the legislature of Upper Canada, or of the late Province of Canada, or the Province of Ontario, other than railway, insurance, or loan companies: see s. 210.

The Act, we also note, does not take effect until the 1st July, 1907, and there is power given to the Lieutenant-Governor in council to relieve from compliance with the provisions any companies incorporated before that date.

Chapter 35 makes a new provision in regard to municipalities taking stock in, or guaranteeing the bonds of, or making loans to, companies carrying on business within the limits of such municipalities.

Chapter 36 makes some amendment to the Insurance Act, inter alia a provision for obtaining in a summary way a judicial declaration that an insured person who has not been heard of for 7 years is dead, and, "to remove doubts," it is also declared that the insured may designate a beneficiary by his will; "and for such purpose such will shall speak from the date of signing thereof." A variation, we may observe, from the Wills Act, which declares wills are to be construed with reference to real and personal estate comprised in them to speak and take effect as if executed immediately before the death of the testator, unless a contrary intention appear.

Chapter 37 is an important Act. It is well known that some companies incorporated by the province for operating "public utilities," which is defined to include water works, gas works, electric light and power works, telegraph and telephone lines, etc., etc., have subsequently been declared to be works "for the general advantage of Canada," and have thus passed out of provincial control, and it is now enacted that all such companies shall forfeit all powers conferred by their provincial incorporation. Municipal corporations are, moreover, hereafter forbidden to contract with companies not under provincial jurisdiction for the supply of any "public utility" without first obtaining the approval of the Lieutenant-Governor in council.

By c. 38 further powers are conferred on the Ontario Railway Board, inter alia to inquire and report as to rates charged for public utilities.

Chapters 40 and 41 are devoted to amending the Municipal and Assessment Acts, and do not seem to call for any special notice. We may also pass over the amendments to the Municipal Drainage Act, the Public Parks Act, the Municipal Water Works Act, the Liquor License Act (cc, 42-46), also c. 47, which provides for plugging of disused gas wells, and c. 48, which amends the Ditches and Water Courses Act.

Chapter 49 is a consolidation of the Ontario Game and Fisheries Act, and also does not seem to require notice. We

observe that a new species of weapon called an automatic gun, in which the recoil is used for reloading, is forbidden to be used for shooting game.

Chapter 50 makes some slight amendments respecting the Education Department.

Chapter 51 makes some amendments in the Public Schools Act, inter alia a provision for the education of immigrant children whose parents and guardians are not ratepayers, and who are in the custody of any corporation, society, agent, or person. Urban school boards are also empowered to provide uniforms for classes in military drill, and also to promote and encourage gymnastics and athletic exercises.

Chapter 52, "An Act respecting the Qualifications of Certain Teachers," is, no doubt, due to the recent decision of the Privy Council in reference to the qualification of certain Separate School teachers: Grattan v. Ottawa Separate School Trustees, 8 O. L. R. 135, 9 O. L. R. 433, [1907] A. C. 69; and is intended to give the gentlemen whose qualifications were there in question, a status which the result of that litigation shewed they were not entitled to as the law then stood. The Act, however, provides that all members of religious communities hereafter appointed as teachers in Roman Catholic separate schools are to possess the same qualifications as are required from public school teachers.

None of the other Acts of the past session need be here referred to.

RECENT CASES FROM THE TIMES LAW REPORTS.*

Carrier.]—The plaintiff in Hooper v. Furness R. W. Co., 23 T. L. R. 451, sued for damages for injury to his hand by negligence of the defendants' servants while he was a passenger on the defendants' steamer. He had bought a cheap-fare ticket, on which was printed the words "At passenger's own risk." As it did not appear that he had seen these words on the ticket, or that reasonably sufficient notice had been given him of this condition, judgment was given in his favour, and upheld by a Divisional Court on appeal.

Company.]—Under the Companies Act, 1862 (England) an order for a compulsory winding-up may be made notwithstanding that a voluntary winding-up is already in progress, though the petitioner is able to make out a case for inquiry only, and not of "prejudice" within the meaning of s. 145 of the Act: Re Herman Lichtenstein & Co., Ltd., 23 T. L. R. 424.

Copyright.]—An action to restrain the sale of phonographic records of a copyright song was dismissed, on the ground that such a record was not a "sheet of music," nor a "book," nor otherwise within the English Copyright Act: Newmark v. National Phonograph Co., 23 T. L. R. 439.

Extradition.]—An order for extradition may be executed in England, under the Extradition Treaty with Belgium, notwithstanding that the prescriptive period fixed by Belgian law has expired, and the offence is therefore no longer punishable in Belgium, where proceedings have been taken and the order for committal for extradition made within the prescriptive period: Re Van der Anwera, 23 T. L. R. 415.

* Including cases reported in the number for the week ending May 7, 1907.

Factor.]—The decision of Channell, J., in Oppenheimer v. Frazer, 23 T. L. R. 183, has been reversed by the Court of Appeal: 23 T. L. R. 410. Section 2 of the (English) Factors Act, 1889, provides that "where a mercantile agent is, with the consent of the owner, in possession of goods," a sale by the agent, in the ordinary course of business of a mercantile agent, is valid. One Schwabacher, a diamond broker, obtained diamonds from the plaintiffs by the trick of representing that he had a purchaser for them, whom he named. Schwabacher having, through the defendant Broadhurst, disposed of them to the other defendants (who purchased on joint account with Broadhurst and paid Schwabacher in full), the plaintiffs brought the action for conversion. The jury found that Broadhurst had not acted in good faith, and Channell, J., gave judgment against him, but as against the other defendants he dismissed the action, on the ground that though the diamonds were obtained from the plaintiffs by a trick, they were in Schwabacher's possession "with the consent of the owner." The Court of Appeal holds, however, (1) that as the trick amounted to larceny, there was no consent, and (2) that, the jury having found that Broadhurst had not acted in good faith, the other defendants, who were partners with him in the transaction, were affected by his bad faith.——Another case on the same section of the Act is Waddington v. Neale, 23 T. L. R. 464, where an agent sent a piano to auctioneers for sale by auction. This was held not to be a sale, pledge, or other disposition "in the ordinary course of business of a mercantile agent."

Fraudulent Conveyance.]—A case of much legal interest (as well as of local interest in Canada) is Ideal Bedding Co. v. Holland, 23 T. L. R. 467, an action by manufacturers at Toronto to set aside a voluntary settlement by the defendant upon his wife and children of a reversionary interest in certain personalty under his father's will. The plaintiffs had recovered judgment against the defendant, who had been in their employ, for £2,875, alleged to have been

misappropriated by him; and in this action attacked the settlement as made to delay and defraud his creditors. Mr. Justice Kekewich held that the defendant's insolvency was proved, and that the question for solution was whether the settlement did in fact take anything out of the reach of the creditors. Inasmuch as by 1 & 2 V. c. 110, s. 14, a charging order might be made upon any property in which a judgment debtor had an interest (including an equitable reversionary interest, as in the present case), the settlement which interfered with such an order being made was within the statute. Further, by means of equitable execution (the law as to which "must be taken to be still in the making") the plaintiffs would, but for the settlement, have had a remedy of at least "some utility." On both these grounds the settlement was held within the statute of Elizabeth, and a judgment was pronounced declaring it void against creditors.

Landlord and Tenant.]—A lease was granted to a joint stock company which was afterwards wound up under the Companies Act. The landlord thereupon sued the defendants, who were sureties, for payment of the rent "during the term." Held, by a Divisional Court, that the term came to an end when the company was wound up, and the defendants were not liable for subsequent rent. Leave to appeal was given: Mayor of Hastings v. Letton, 23 T. L. R. 456.

Liquor License.]—The respondent, an unlicensed person, arranged with a licensed person, from whom he purchased liquor, to sell the liquor at an exhibition booth. The licensed person sold it personally and by bar maids usually in his employ, but paid by the respondent during the exhibition. The respondent did not personally make or control sales, though he was present from time to time and received the proceeds from the licensed person. Held, by the King's Bench Division, that the respondent really made the sales, though by an agent or agents, and was liable to conviction

for selling without a license: Dunning v. Owen, 23 T. L. R. 494.

Master and Servant.]—Under the (English) Workmen's Compensation Act, the House of Lords has held that it was "serious and wilful misconduct" for a fireman to leave the footplate of a railway engine in order to get upon the tender, while the train was in rapid motion, it being shewn that a rule of the railway company, known to the fireman, forbade leaving the footplate under such circumstances, and no proof being given that there was any necessity compelling a breach of the rule. The fireman having been killed as a result of knowingly and wilfully disobeying a rule of a most important character, it was held that his widow had no claim for compensation under the Act: Bist v. London and South Western R. W. Co., 23 T. L. R. 471.——In Perkins v. Stead, 23 T. L. R. 433, the defendant had bought a motor car, had paid for it, and obtained possession of it. The vendors supplied a man to take it to the defendant's home, and while it was being driven there, the defendant and his son being also in the car, an accident happened and a person was injured by the negligence of the vendors' driver, giving rise to the action. The usual question arose as to whether the driver was, in the circumstances, the servant of the vendors or of the defendant. Held, by a Divisional Court, that the driver was in this case the servant of the defendant for the particular purpose stated, and the defendant was liable for his negligence.

Negligence.]—The plaintiff was a passenger on the defendants' omnibus, and on the omnibus turning a corner sharply, keeping close to the kerb to avoid a motor-car, the plaintiff's arm, which projected beyond the omnibus, came in contact with an electric light standard, which was flush with the curb, and was injured. The County Court Judge who tried the action held that there was no evidence of negligence to go to the jury. On appeal, the nonsuit was sustained by a Divisional Court as right in the absence of

evidence that the driver knew the plaintiff had assumed a position of danger, so that the corner could not safely be turned sharply; or that, with reasonable care, the driver should have seen that there was an obstruction which was likely to hit a passenger: Simon v. London Omnibus Co., 23 T. L. R. 463.

Pawnbroker.]—A justices' order for restitution to the owner of goods stolen and pawned, is not a bar to an action by the owner against the pawnbroker to recover the goods: Leicester v. Cherryman, 23 T. L. R. 444.

Restraint of Trade.]—A covenant by the defendant not to engage during five years in any business similar to the plaintiffs', or with any house carrying on such business, except any business not competing or calculated to compete with the plaintiffs' business, was attacked in White v. Wilson, 23 T. L. R. 469, as unreasonable. It was shewn that the plaintiffs were extending their business to various parts of the world. Held, that, as the test of reasonableness was whether the covenant was necessary for the plaintiffs' protection, and as the covenant in this case expressly excepted any business which did not compete and was not calculated to compete with the plaintiffs' business, it was clearly enforceable.

Security for Costs.]—So long as a case remains in the same Court, the power to order security for costs is a matter of the domestic jurisdiction of the Court. As appeals from decisions of official referees go (in England) to a Divisional Court, the latter has inherent jurisdiction to order security in a proper case on such an appeal: Billington v. Billington, 23 T. L. R. 473.

Statute of Limitations.]—An executor, in 1898, paid over the residue of an estate to he residuary legatee in good faith and without notice of his testator's liability as guarantor of payment by the residuary legatee to the plaintiffs of certain premiums on an insurance policy. In 1903, default having been made then for the first time in payment of the pre-

miums, the plaintiffs sued the executor as on a devastavit to recover them. Held, that (even apart from s. 8 of the Trustee Act, 1888), the claim against the executor was barred by 21 Jac. I. c. 16, and that the six years ran from the date of payment over of the residue in 1898, and not from the time of the default in 1903: Lacons v. Warmoll, 23 T. L. R. 495.

Will.]—A case which has attracted a great deal of attention in England is Re Wagstaff, Wagstaff v. Jalland, 23 T. L. R. 426. One Wagstaff had gone through the form of marriage with Mrs. Jalland, her husband, Jalland, being alive. Wagstaff, at his death, left property to the value of £180,000, and gave the income of his residuary estate to "my said wife during her life if she shall so long continue my widow," and made other provisions in the event of her "second marriage." Kekewich, J., after considering the various interpretations which might be put upon the words of the will in the peculiar circumstances, held that the words "wife" and "widow" were used by the testator in a secondary sense, and clearly indicated Mrs. Jalland, and that she was entitled to the income from the fund in question until her death or until she should actually contract another marriage.

THE LATEST ONTARIO DECISIONS.*

Alien Labour Act.]—The employment by the defendants of persons who came to the country of their own accord, and not knowing whether they would be engaged or not, was held in Rex v. H. Corby Distillery Co., 9 O. W. R. 762, not to be within the Alien Labour Act, R. S. C. 1906 c. 97. The defendants, having engaged a foreign company to furnish the materials and perform the necessary work for the installation of a distillery plant, were held not responsible under the Act for the employment of persons hired and paid by the foreign company. The plant in question being unlike any in Canada and constructed upon plans prepared by the agent for the foreign company, who would not intrust their execution to any one but his own foreman, and involving improvements which the foreign company did not wish other people to handle, the employment of the foreman was also held not to be within the Act, his work being skilled labour not obtainable anywhere in Canada; but where an employee of the defendants spoke to the manager about employing a certain millwright, and then wired offering the latter terms, and, on such terms proving satisfactory, invited him to come, and he did come and go to work without any other hiring, it was held that there was a violation of the Act, the defendants having accepted the engagement made by their employee.

Arbitrator.]—Objection was taken in Re Cavanagh and Canada Atlantic R. W. Co., 9 O. W. R. 842, to the reception upon appeal from an award of compensation for lands taken for the railway, of an affidavit made by a barrister, one of the arbitrators. Notwithstanding the well understood rule that a barrister should avoid making affidavits in mat-

* Short notes of the most important cases in Volume IX. of the Ontario Weekly Reporter, Nos. 15, 16, 17, 18, pp. 721 to 992, inclusive.

ters in which he is engaged professionally, Riddell, J., received the affidavit in evidence. Difficulties suggest themselves as to the ability of a barrister who is also a solicitor to maintain a distinction between his professional engagements in the two capacities.

Building Contract.]—The contract in question in Mills v. Small, 9 O. W. R. 893, was one that, as yet, is not common in this country. The plaintiffs, architects, contracted with the defendant to provide the necessary drawings and specifications, secure proposals from contractors, and arrange for and supervise the furnishing of materials and performance of work in connection with the building of a theatre for the defendant. The plaintiffs guaranteed that the cost would not exceed $22,500, and the plaintiffs' remuneration was fixed at $2,500. The building as originally planned was enlarged at considerable expense on the order of the defendant's agent, ratified by the defendant, and other extra cost was incurred with the knowledge and acquiescence and at the request of the defendant or his authorized agent, so that the total cost was increased to $34,000. Though the contract was not a "commission" contract, Riddell, J., was of opinion, that, this extra work not being done under the contract, the plaintiffs were entitled to additional remuneration therefor.

Company.]—It is pointed out by Boyd, C., in Re Canada Cabinet Co., 9 O. W. R. 818, that the summary action provided for under s. 39 of the Winding-up Act as to mortgages on land may be properly exercised only when the liquidator is the sole party interested in the property mortgaged. There being subsequent incumbrancers, leave was given the applicants, mortgagees, to bring an action.——In Re Peterborough Cold Storage Co., 9 O. W. R. 850, it appeared that the company's stock was sold upon the terms that 25 per cent. should be paid down, and 25 per cent. upon allotment. Certain directors having disposed of the bulk of their shares without making the down payment, it was

held by Boyd, C., that the case came within s. 20 of R. S. O. 1897 c. 191, as a transfer of shares upon which previous calls had not been paid, and that such directors were liable to be put upon the list of contributories in respect of such shares. Besides, there was held to be a breach of the duty imposed upon the directors by s. 28 to guard against transfers being made to persons of insufficient means.——In Ruethel Mining Co. v. Thorpe, 9 O. W. R. 942, the plaintiffs sought to have it declared that a certain mining location in the township of Buck was held by the defendant Thorpe in trust for the plaintiffs. It appeared that the defendant Thorpe went to Cobalt for reasons of his own, and while there concluded that it was advisable for himself and partners to secure this location, whereupon he sent them word that it could be had and asked for $200 to secure it. He had the location transferred to himself. It was held by Anglin, J., that the facts that the plaintiff company had been formed by a syndicate consisting of the defendant and his partners, that this syndicate had agreed to pay his expenses and that the company should bear such expenses so far as they could be justly charged with them, and that the payment for the location was made out of the money of the company, were not sufficient to constitute the defendant a trustee of such location for the plaintiffs. But the partners of Thorpe who were co-directors with him of the plaintiff company, and whose interest was not disclosed, were held accountable for the portion of the proceeds of a sale of this location to the company received by them.——In Deacon v. Kemp Manure Spreader Co., 9 O. W. R. 965, it appeared that the letters patent of incorporation of the defendants "ordained and declared" that the preference stock should become and remain a lien on the assets of the company so that in the event of the voluntary or compulsory winding-up of the company, the holders thereof should be entitled to receive the amount of their stock, together with unpaid dividends, if any, in full at par, before the holders of ordinary stock should receive anything on ac-

count of their stock. An order for the voluntary winding-up of the company having been made, this action was brought to have it declared that the order was made without jurisdiction, and was obtained by fraud, collusion, and the improper concealment of facts, and for an injunction restraining the defendants from acting under it. Anglin, J., held that the lien created by the letters patent must be satisfied before holders of the common stock would be entitled to payment, no matter how the assets of the company were distributed. Other objections to the order, involving the right and jurisdiction of the County Court Judge to make it, were considered and overruled, so that it became unnecessary to expressly decide whether since a remedy was provided the plaintiff by ss. 23, 27, and 33 of the Act, his action could be maintained, though the Court considered it "more than doubtful."

Conversion.]—The judgment of a Divisional Court in Griffiths v. Grand Trunk R. W. Co., 9 O. W. R. 875, discusses and defines the right of a person in whose possession chattels happen to be, to delay delivery to a claimant until legal advice can be obtained as to the latter's rights, and what is a reasonable delay for such purpose. It was held that the practice of the defendants coming into Court after a conversion and asking for a stay, has not been abrogated. Rather the effect of s. 128 of the Judicature Act is to continue this useful practice.

Covenant.]—It is decided by a Divisional Court in Carpenter v. Carpenter, 9 O. W. R. 862, that the proper construction to be put upon a covenant in a deed of dissolution of partnership, that a partner, ceasing to carry on a branch of the business, should not engage in that particular business for 10 years, provided that the covenantee should continue for such time to carry on such business, is that the covenantor would not interfere with the business of the covenantee, provided the covenantee should always during the period of time mentioned continue to carry on *as pro-*

prietor such business, and this condition is not complied with where the covenantee sells out his business to a joint stock company of which he becomes assistant-manager.

Dower.]—A fine point arose in Re Smithers, 9 O. W. R. 819, as to whether a woman who had left her husband and engaged in open and promiscuous prostitution without any continuous tarrying with one man, had lost her right to dower by reason of the statute West. II. (13 Edw. I. c. 34), which provides that if a woman leaves her husband and lives with an adulterer she shall lose her dower, unless her husband be voluntarily reconciled to her. Riddell, J., on the authorities, decided the question in the affirmative.

Executors.]—It is decided by the Surrogate Judge of York in Re Phipps, 9 O. W. R. 892, that s. 65 of the Surrogate Courts Act has not changed the law with respect to the right of an executor to retract a renunciation of probate, and that he still has that right in a proper case.

Infant.]—The question in London Manufacturing Co. v. Milmine, 9 O. W. R. 829, decided by Riddell, J., in the negative, was whether a letter written by the defendant after he reached his majority and addressed to the plaintiffs' solicitors, in which he stated that the latter had apparently been misinformed relative to "my account," was a sufficient ratification of a promise to pay for goods purchased during nonage. It is pointed out by the Court that there is a recognition that an account exists, but no "recognition of an existing liability."——In Federal Life Assurance Co. v. Hewitt, 9 O. W. R. 857, it was considered that, whatever might be the effect of s.-s. 6 of s. 150 of the Ontario Insurance Act upon the infant's contract for life insurance, it did not render such infant liable upon a bill of exchange or promissory note given for the amount of an insurance premium. The case is likened to that of a note given by an infant for necessaries.

Insurance.]—The damage claimed by the plaintiffs in Hawthorne & Co. v. Canadian Casualty and Boiler Inspection Co., 9 O. W. R. 809, was occasioned by the escape of water from a "sprinkler" system in the plaintiffs' warehouse, caused by the freezing and bursting of a water pipe, part of such system. A policy of insurance against damage caused by the escape of water from this system contained this clause: "This policy of insurance does not cover loss or damage resulting from the explosion, rupture, collapse, or leakage of steam pipes, or steam boilers, nor resulting from any interruption of business or stoppage of any work or plant, nor resulting from freezing, nor resulting from fire, or violation of the law," etc. There having been no reference to freezing in the application or interim receipt, the Court of Appeal held that this condition was not in that respect binding upon the plaintiffs, and that, in any event, the exception as to frost was not expressed in terms reasonably clear and sufficient to have the effect of limiting the obligation arising from the general words of the contract.

Life Insurance.]—It is decided by Anglin, J., in Re Canadian Order of Home Circles and Smith, 9 O. W. R. 738, that a provision in a will, even if such provision is authorized by s. 160 of the Insurance Act (R. S. O. 1897 c. 203), that the enjoyment of the insurance moneys by any preferred beneficiary be postponed beyond the time at which he attains the age of 21 years, is ineffective, being indistinguishable from a like provision in regard to personal property bequeathed by will.——Charles B. Kemp, having a certificate of life insurance with the Ancient Order of United Workmen, loss payable to his wife and children, and being indebted to his daughter Corinne Johnson in a sum larger than the amount of the insurance certificate, surrendered the latter and took another, loss payable to her, which she accepted in satisfaction of her claim. It was held by a Divisional Court that it was not competent for the insured to do this, because,

while Corinne Johnson was one of the class among whom he had power to apportion the fund under s.-s. 1 of s. 160 of the Ontario Insurance Act, the appointment to her was really for his own benefit and for relieving his estate of the debt, contrary to s.-s. 1 of s. 159 of the Act. Apart from the statute, the appointment was held void, because, in exercising a power of appointment, the appointor must act in perfect good faith, with the honest desire only of promoting the real object of the power and nothing beyond it: Re Kemp, Johnson v. Ancient Order of United Workmen, 9 O. W. R. 899.

Local Option By-law.]—A local option by-law passed by the municipal council within two weeks after the clerk had declared the result of the voting, was held by Mulock, C.J., in Re Duncan and Town of Midland, 9 O. W. R. 826, to be invalid by reason of the provisions of ss. 369, 370, 371, and 374 of the Municipal Act, which give the right to electors to petition within the time named for a scrutiny of the ballot papers.——It is decided by Riddell, J., in Re Armour and Township of Onondaga, 9 O. W. R. 835, that once the name of a person appears upon the voters' list, no matter what the qualification stated may be, he can qualify by taking any form of oath given by the statute which he can truly take. So also in the case of a person under age at the time of the final revision who becomes of age before the election. It is also held that the amendment of 3 Edw. VII. c. 18, s. 74, deprives deputy returning officers of the right to vote upon local option by-laws. —— In allowing an appeal in Re Rickey and Township of Marlborough from the order of Mabee, J., 9 O. W. R. 563, noted ante 380, a Divisional Court decided that the expression "for three successive weeks" in s. 388, s.-s. 1, of the Consolidated Municipal Act, 1903, should embrace three successive periods of seven days each beginning on the first day of actual publication, and not on the first day of the biblical week in which the first publication appears. It is also decided that a publication for only 2 weeks when the statute requires publica-

tion for 3 successive weeks is not such an irregularity as s. 204 contemplates: 9 O. W. R. 930.

Master and Servant.]—In Dodds v. Consumers Gas Co., 9 O. W. R. 905, Britton, J., distinguishing the case from that where injury results from a machine obviously dangerous—one as to which the workman would know or ought to know as much as the master—held the defendants liable at common law for the plaintiffs' injuries, because the plant causing such injuries—a tank for the purifying of gas by the "oxide" method—was one requiring great knowledge and skill for the proper supplying and operating thereof, and was dangerous, and this danger was unknown to the plaintiffs and not wholly known to the defendants' overseer, though its danger was known to the defendants.

Mechanics' Liens.]—An appeal by certain defendants in Dunn v. McCallum from the order of Falconbridge, C.J., 9 O. W. R. 315, noted ante 273, reversing the order of the Master in Chambers, 9 O. W. R. 33, noted ante 112, was allowed by a Divisional Court: 9 O. W. R. 756. It is held that where a claim of lien is based upon the fact of an action having been commenced within the time allowed therefor, the statement of claim in such action cannot be amended any more than can a claim of lien.

Municipal Corporations.]—Under s. 437 of 3 Edw. VII. c. 19 (O.) a corporation closing a street or road must make compensation for the damages necessarily resulting beyond any advantage the claimant may derive from the contemplated work. In Re Brown and Town of Owen Sound, 9 O. W. R. 727, Mabee, J., decides that an appreciation in the value of the claimants' land by reason of the establishment contiguous thereto of certain works by a company in whose interest a street was closed, was not an advantage within the section.——Though the closing of the lane or alley provided for in the by-law in question in Re Mills and City of Hamilton, 9 O. W. R. 731, was not imperatively necessary in the

Promissory Notes.]—An appeal in Crown Bank of Canada v. Brash from the judgment of a Divisional Court, 8 O. W. R. 400, noted 26 C. L. T. 740, was dismissed by the Court of Appeal: 9 O. W. R. 789.——In Bowins v. Home Bank of Canada, 9 O. W. R. 938, the plaintiff sued for the return of certain promissory notes given by him to the defendants. Riddell, J., held that all parties to the transaction which resulted in the notes being given were engaged in compounding a felony, since in the circumstances no one could imagine, and the defendants' manager did not imagine, that the plaintiff would have been willing to give the notes unless to save his brother from a charge of forgery, or that these notes would have been given had the plaintiff supposed that the giving of them would not prevent the prosecution. Following Williams v. Bayley, 4 Giff. 638, L. R. 1 H. L. 200, it was held that in the circumstances the plaintiff was entitled to the return of the notes.

Railway.]—In McKenzie v. Grand Trunk R. W. Co. and Dickie v. Grand Trunk R. W. Co., 9 O. W. R. 778, actions to prevent the defendants from changing or interfering with bridges and an underpass over and across the defendants' line of railway at places where it intersected the farms of the plaintiffs, it was shewn that the bridges and underpass were constructed in 1854, at the time when the line of railway was being laid down; and the Court of Appeal held that there was sufficient in the circumstances and the facts proved fully to justify the conclusion that the bridges and underpass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreement or arrangement under which the defendants' predecessors in title acquired their right of way; and therefore the defendants were in the wrong in assuming to interfere with the plaintiffs' rights without the sanction and authority of the Board of Railway Commissioners. The circumstances of the cases did not warrant the contention that it lay upon the plaintiffs to apply to the Board—the defendants were seeking to disturb

R. W. Co.'s tracks, approached the gate, and finding it open relied upon this fact as notice to him that no train was approaching. He did not see the watchman, but thought he was in his cabin. On attempting to cross the tracks he was struck by a train and received the injuries for which the action was brought. Britton, J., held that he could not recover because there was no duty cast upon the defendants to keep a gate or watchman at the point mentioned, and, even though they had undertaken to do so, they were not bound to continue.

Patent for Invention.]—The question was raised in Copeland-Chatterson Co. v. Lyman Bros. Co., 9 O. W. R. 908, whether the requirement that a patentee shall sell the patented device at a "reasonable price" (see s. 57 of R. S. C. c. 61), permits the introduction of a condition or restriction as part of the price. Boyd, C., found it unnecessary to decide the question, but points out that the contrary was held by Burbidge, J., in Copeland-Chatterson Co. v. Hatton, 10 Ex. C. R. 224, without apparently his attention being directed to the opinion of Sir John Thompson in Royal Electric Co. v. Edison Electric Co., 2 Ex. C. R. 576, 608-9.

Police Magistrate.]—The conviction in Rex v. Holmes, 9 O. W. R. 750, for an offence under the Liquor License Act, was quashed by a Divisional Court, on the ground that the convicting magistrates had no jurisdiction. The offence was charged as having been committed at the town of Amherstburg, where there was a police magistrate, and the case was tried at the town of Essex by W. B. Beaman, police magistrate for that town, who purported, however, to act as a justice of the peace for the county of Essex, and so signed the conviction, and William Church, a justice of the peace for the county of Essex. It did not appear that the accused was apprehended at the town of Essex, or that the police magistrate for Amherstburg was ill or absent or requested the convicting justices to act in his stead.

Street Railway.]—The plaintiff in Hill v. Toronto R. W. Co., 9 O. W. R. 988, while crossing a street, was struck by a car of the defendants, and received the injuries for which he sued. There was nothing in the street to obstruct the plaintiff's view, and the only explanation of his not seeing the car was that he did not look, but walked blindly into it. There was evidence that the car was travelling at an excessive rate of speed. Teetzel, J., held that if there was any negligence on the part of the defendants, such negligence was not shewn to be the cause of the accident, and that the plaintiff, therefore, could not recover. A rare instance of a nonsuit in this kind of case.

Third Party Procedure.]—The defendants having set up an agreement by the Ontario Bank to indemnify them against the plaintiffs' claim, Mabee, J., in Peterborough Hydraulic Co. v. McAllister, 9 O. W. R. 724, held that the bank were, notwithstanding their contention that the agreement mentioned was beyond their powers, and was not properly executed so as to bind the bank, properly served with a third party notice.

Trade Union.]—An appeal in Metallic Roofing Co. of Canada v. Jose from the order of a Divisional Court, 7 O. W. R. 709, 12 O. L. R. 200, noted 26 C. L. T. 413, was dismissed by the Court of Appeal: 9 O. W. R. 786.

Venue.]—A change of venue from Toronto to London was refused by Britton, J., in Rex v. O'Gorman and others, 9 O. W. R. 928, on motion by the defendants, against whom a true bill for conspiracy had been found. The offences charged were supposed to have been committed at Toronto. It was but faintly suggested that there was or was likely to be any prejudice in Toronto, and certainly no more than in London, rather the reverse. The only ground upon which the motion could be supported was held to be the ground of the balance of convenience, owing to the probable number of witnesses from London that would be required. But,

while the Court considered that it would not be "expedient to the ends of justice" that the accused should be convicted if there was evidence that could be obtained to establish their innocence, if it should so happen that the accused really should need the assistance of the Crown to have necessary and material witnesses in their behalf brought to Toronto, such assistance would no doubt be given.

Waste.]—An appeal by the plaintiffs in Morris v. Cairncross from the judgment of Boyd, C., 7 O. W. R. 834, noted 26 C. L. T. 507, was dismissed by a Divisional Court: 9 O. W. R. 918.

Will.]—A provision in a will that a legatee should not engage in any form of gambling or games of chance, was held by Boyd, C., in Re Quay, 9 O. W. R. 823, having regard to the whole tenor of the will, not to refer to playing games by way of diversion or amusement, but to making that the staple of the daily occupation of the legatee. Hence the provision was to be construed as not merely in terrorem, but as a competent direction in furtherance of public interests, which should be observed as a condition of the legatee receiving the legacy in question.——A provision in a will by which the testator devised all his property (consisting of realty and personalty) to his wife for life and after her death, and on the arrival of the youngest surviving child at the age of 21 years, to be equally divided amongst all his children, and in case of the death of any child who shall be married and leave children, the share of that child to be divided equally among his or her children, was held by Boyd, C., in Re Stainsby, 9 O. W. R. 839, the testator having died in 1886, the youngest child having come of age in 1903, and the widow having died in 1907, to vest the share of a daughter who died without children in 1900, before the youngest child had attained the age of 21 years, upon such daughter reaching the age of 21 years, so as to entitle her husband to an interest in the testator's property.——The construction of this clause in a will was in question in Re

Moir, 9 O. W. R. 858, "All the residue of my estate . . . I give in equal shares to all my children except J., as she has already had more than the others. Her share or a double share shall go to M." Held, by Riddell, J., that M. having died in the lifetime of the testator leaving issue, the rule that in the case of gifts to a class, as tenants in common, the shares of members of the class dying before the testator do not pass to the issue of those dying, but go to the other members of the class, applied; and the fact that M. was named specially was held to make no difference.—— Re Lomas, 9 O. W. R. 975, was a case where probate of a will was sought, the sole beneficiary having signed with two others to the right of the attestation clause. It appeared that such beneficiary had been informed that she could not be a witness and that she signed because she thought she ought to do so, being the executrix named in the will. The Surrogate Judge of York considered the evidence adduced that the beneficiary did not attest the signature to the will as one of the witnesses thereto stronger than that produced in In the Goods of Sharman, L. R. 1 P. & D. 661, and directed that the probate issue.——An attempt had been made to revoke the will offered for probate in Re Tuckett, 9 O. W. R. 979, by a later instrument in the form of a will, which however was invalid by reason of the husband of the sole devisee attesting the instrument. The will had been destroyed upon its supposed revocation. The Surrogate Judge of York directed that probate of the will issue, as its cancellation was only on the supposition that the later instrument was effective. —— The husband and sole beneficiary of the testator in Re Coleman, 9 O. W. R. 985, not having any duties imposed on him by the will that would constitute him an executor, was held by the Surrogate Judge of York to be entitled to a grant of letters of administration only, and not to probate according to the tenor of the will.

CASES FROM WESTERN CANADA.*

Administrator Pendente Lite.]—Mathers J., refused to appoint an administrator pendente lite in Tellier v. Schileman (Man.), 5 W. L. R. 467, where the plaintiff sued to set aside a will, and also a mortgage and bill of sale of a livery stable business, made by her father in favour of the defendants, on the ground that they were procured by undue influence. The principle applied was that where there is a person clothed with a right to the custody and control of the estate, an appointment will not be made, unless a case of necessity, owing to the estate being in jeopardy, is shewn.

Alimony.]—The plaintiff in Cunningham v. Cunningham (N.W.P.), 5 W. L. R. 514, set up in her application for interim alimony that her reason for leaving her husband was that he had endeavoured to compel her to commit adultery with one Powers. The husband, on the other hand, made an affidavit, which was not contradicted, shewing that, after leaving him, against his wishes, she was guilty of conduct, the only inference from which was that she had been guilty of adultery with Powers, and that she was in fact living with and *being supported by* the latter. In these peculiar circumstances, Scott, J., refused the application, on the ground that she had means of support independent of her husband.

Appropriation of Payments.] — The case of Lemon v. Dunsmuir (B.C.), 5 W. L. R. 505, turned upon the question whether there had been an appropriation of a payment of $1,000 made by one Mesher to the plaintiffs upon Mesher's account for lumber supplied by the plaintiffs for the defendant's house for which Mesher was the contractor. Mesher, who owed the plaintiffs on different accounts, had promised a

* Short notes of the most important cases in volume V. of the Western Law Reporter, No. 6, pp. 449 to 532, inclusive.

payment of $3,500, and, having received a payment of $2,000 from Dunsmuir, paid them $1,000 only. At the time he inquired how much he owed on Dunsmuir's account, and was handed by Lemon a slip shewing the amount, which he put in his pocket, promising to see Lemon on Monday. Lemon did not know at the time that the money came from Dunsmuir. The full Court, Clement, J., dissenting, held, reversing the ruling of the County Court Judge, that the evidence did not establish such appropriation.

Assessment and Taxes.]—The tax sale in question in Re Bannatyne and Pritchard (Man.), 5 W. L. R. 478, was held invalid by the Court of Appeal because there was no resolution of the municipal council authorizing the reeve (who bought the property in for the municipality at the sale) to attend the sale and bid on behalf of the municipality.

Constitutional Law.]—Doubt is expressed by the Court en banc in Re Klondike City Town-site (Y.T.), 5 W.L.R. 526, as to the constitutionality of c. 6 of the Ordinances of the Yukon Council for 1906, providing for the decision of constitutional and other Territorial questions. It became necessary to decide this, because the Court were unanimously of the opinion, on the facts submitted, that Klondike city is a townsite which is excepted from the right of miners to locate the same or any portion thereof.

Contract.]—It was held by the full Court in McMeekin v. Furry (B.C.), 5 W. L. R. 487, Martin, J., dissenting, that the signature "J. Boscowitz & Sons" upon a contract in writing made by Leopold Boscowitz, the sole owner of the property affected, who said that he intended such signature as his signature, was sufficient to satisfy the Statute of Frauds, though there was no such firm as "J. Boscowitz & Sons."

Costs.]—Fox v. Peters (B.C.), 5 W. L. R. 505, was an action for a balance of $720.81, upon a promissory note, brought in the Supreme Court. The County Courts having

jurisdiction over claims of this nature up to $1,000, Clement, J., notwithstanding s. 100 of the Supreme Court Act, held that, there being no good reason for bringing the action in the Supreme Court rather than the County Court, there was "good cause" for depriving the plaintiff of full costs.

Defamation.]—The Court of Appeal, Perdue, J., dissenting, allowed an appeal by the plaintiff from the judgment of Macdonald, J., in Nagy v. Manitoba Free Press Co. (Man.), 5 W. L. R. 20, noted ante 117, holding that, while the action was a novel one, the novelty was merely in the incidents from which the right of action was alleged to arise, and not in the principle involved; and that, since the reasonable and inevitable result of the publication in question (which stated that the plaintiff's house was haunted) would be to greatly decrease the desirability of the house for purposes of habitation, owing to the probable difficulty in getting servants and for other reasons, the plaintiff was entitled to recover: 5 W. L. R. 453.

Highway.]—A servant of the plaintiff in Couch v. Municipality of Louise (Man), 5 W. L. R. 482, driving a team of the plaintiff along a road allowance in the evening, ran into a barbed wire fence, which had been erected partly across the road, with the result that one horse was killed and the other injured. The action was to recover damages for the loss and injury sustained by the plaintiff. The County Court Judge having entered a verdict for the plaintiff, the Court of Appeal, Howell, C.J.A., dissenting, in dismissing an appeal by the defendants, laid down the rule that where a plaintiff has shewn that improvements have been made on a portion of a road with the intention that such road should thereafter be considered complete and open for traffic, the case is brought within s. 667 (a) of the Municipal Act.

Judgment.]—In Moses v. Bible (N.W.P.), 5 W. L. R. 520, the defendant asked that a judgment recovered against him in a previous action be set aside as having been obtained by fraud and perjury. Harvey, J., expressed himself as not

prepared to follow the decisions in England and Canada where such judgments had been set aside, such decisions not being absolutely binding on the Court. On the evidence such fraud and perjury were held not to have been satisfactorily made out.

Mandamus.]—The point decided by Mathers, J., in Canada Permanent Mortgage Corporation v. East Selkirk School District Corporation (Man.), 5 W. L. R. 451, is that, where a sheriff has instructed the treasurer of a municipality to levy a rate to satisfy a judgment, in case of the default of such treasurer, the judgment creditor, as the party most interested, is, as well as the sheriff, entitled to move the Court to compel its officer, the treasurer (see R. S. M. 1902 c. 143, s. 263 (f)), to act. It was later decided by Macdonald, J., 5 W. L. R. 485, that the treasurer is not under the section named persona designata so that his duties would not devolve upon his successor.

Municipal Corporations.]—To the statement of claim in Teitelbaum v. Municipality of Morris (Man.), 5 W. L. R. 449, in which damages were sought to be recovered for injury to the plaintiff's lands by drainage works of the defendants, the latter demurred, on the grounds that no action lay against the municipality for the mere non-repair of a drain, unless such right of action was expressly given by statute, and that the plaintiff's remedy was by arbitration under the Municipal Act. Mathers, J., following Foster v. Lansdowne, 12 Man. L. R. 42, 416, overruled the demurrer.

Partnership.]—The defendants in Jackson v. Jackson (N.W.P.), 5 W. L. R. 512, had been partners and had dissolved, one partner taking over the business for a consideration and agreeing to indemnify and save harmless the other from all liabilities of the firm, of which the note sued on was one. This liability had not been taken into consideration when the agreement was made, by reason of a common mistake of both parties. Johnstone, J., decided that,

before the rights of the defendants, as between themselves, could be decided, it was requisite that the document in question be set aside and the accounts taken between the parties.

Service out of the Jurisdiction.]—Upon an appeal by the plaintiff in Gullivan v. Cantelon (Man.), 5 W.L.R. 469, from an order of the Referee in Chambers setting aside the service of the statement of claim out of the jurisdiction in an action for commission on the sale of land situated in Saskatchewan, Mathers, J., decided that the action came within Rule 201 (e), because it appeared from a consideration of the terms of the contract, which was one for the sale by the plaintiff, who resided at Winnipeg, of lands in Saskatchewan, where the defendant resided, and of the facts existing at the time, that the finding of a purchaser was to be performed at Winnipeg, and because the payment of the plaintiff's commission was to be made at the latter place, and if this were not sufficiently indicated, the debtor must seek his creditor, which would involve payment at Winnipeg. The requirement that the contract should be one to be performed within Manitoba was held to be satisfied by the facts stated. Leave not having been obtained before service, it was decided that Rule 202 could not be made available to support it.

Trust.]—In the absence of any allegation or proof of fraud, Mathers, J., in McMillan v. Gunn (Man.), 5 W. L. R. 478, an action in which the plaintiffs sought to have a reconveyance, free from the interest of one Midwinter, to the estate of one Sharpe, of certain lands conveyed to him by the plaintiff McMillan in trust for moneys advanced and to be retransferred when the debt from McMillan to Sharpe was paid off, a portion of such lands having been sold by Sharpe to Midwinter without notice to the plaintiffs, held that, in the circumstances, and considering that the title had been vested absolutely in Sharpe by a certificate under the Real Property Act, and that no caveat was registered by McMillan shewing any interest he might claim in

the lands, Sharpe had a right to sell the lands or any part thereof without notice to the plaintiffs (Oland v. McNeill, 32 S. C. R. 23), and that in this view it was immaterial whether Midwinter had or had not notice of the plaintiffs' claim; and the action was accordingly dismissed.

DECISIONS FROM THE COURTS OF QUEBEC AND THE MARITIME PROVINCES.*

Administration.]—In Barrett v. Harper (P.E.I.), 3 E. L. R. 89, Hodgson, M.R., allowed a demurrer to a bill filed by a creditor for administration of the estate of a deceased person, for the reason that it was filed only about 3 months after the death of the testator, and no special grounds were alleged, such as that there was danger of the executor acting improperly or a well-grounded fear of a devastavit. "When a creditor claims the right, not to prove his debt or to sue for it at common law, but to take the estate out of the hands of the executor, and place it in the Court of Chancery, without alleging any reason whatever, that the Court will not allow." Leave to amend the bill was granted.

Animals.]—The claim in Naas v. Eisenhauer (N.S.), 3 E. L. R. 109, was for damage done to the plaintiff's ox upon the highway by the defendant's oxen, which were upon the highway in violation of a by-law of the municipality. There was no proof that the defendant knew the animals were vicious, and there was no evidence to shew how they came upon the highway. The full Court reversed the judgment at the trial in favour of the plaintiff, holding that the case was covered by Cox v. Burbidge, 13 C. B. N. S. 430 (which is not overruled by Lee v. Riley, 18 C. B. N. S. 722); that the defendant was not liable for the act of his oxen without proof of scienter; and that the contravention of the by-law was not material.

Company.]—The decision of Weatherbe, C.J., in American Hotel and Supply Co. v. Fairbanks (N.S.), 2 E. L. R. 345,

*Short notes of the most important cases in Volume III. of the Eastern Law Reporter, Nos. 2 and 3, pp. 45 to 156, inclusive.

noted ante 205, was reversed by the full Court: 3 E. L. R. 104. The judgment of the Court, based chiefly on Smith v. Mawhood, 14 M. & W. 452, was delivered by Russell, J., who said that the question was, whether a company not incorporated by or under the authority of an Act of the legislature of Nova Scotia, and carrying on a business having gain for its object, could recover damages for the breach of a contract made in the course of that business, the defence being that the company had failed to comply with the provisions of the statute requiring them (under a penalty) to transmit to the Provincial Secretary the statement required by c. 24 of the provincial statutes of 1904. The trial Judge had held that a statute imposing a penalty implied a prohibition, and an agreement involving the prohibited act was void for illegality. "I think," says Russell, J., "that the distinction made by Alderson, B., in Smith v. Mawhood, which Mr. Benjamin considered as sound as it was acute, enables us to hold that the contract here sued on was not rendered invalid by the failure of the plaintiff company to comply with the statute. The penalty is imposed for 'carrying on the trade,' not, as in Smith v. Mawhood, in a house in which certain requirements were not complied with, but without having first transmitted the required statement to the Provincial Secretary; and there is no addition to the criminality of the plaintiffs if they make 50 contracts for the sale of machines such as were furnished to the defendant in this case."

Conflict of Laws.]—The important question whether the law of Quebec or that of New Brunswick was to be applied in respect of an action by servant against master to recover damages for personal injury sustained by the servant by reason of the negligence of fellow-servants, where the contract of employment was made in Quebec, but the services were performed and the injury was sustained in New Brunswick, arose in Lee v. Logan (Que.), 3 E. L. R. 132. Tellier, J., delivering the judgment of the Court of Review, said: "This is certainly a Quebec contract. The terms were fixed

in Montreal; the rate of wage and the character and quality of employment were understood between the parties here in Montreal. . . . What is the presumption? Is it not that they intended to subject themselves to the law which was their own law, rather than that which was unknown to them? . . . Does the responsibility arise from the contract or from a quasi-delict? I am of opinion that it arises from a quasi-delict, and therefore it would seem that the law of New Brunswick must apply. . . . We are of opinion that an action does not arise from the contract only. . . . The execution of the contract was in New Brunswick. The law of New Brunswick is the law of England. . . . We are of opinion that the New Brunswick statute of 1903 cannot be applied in this, and we must, therefore, decide it on the English doctrine of common employment. This doctrine is founded on the principle of risk of employment, which brings us back to the contract entered into between the parties at Montreal. The principle of common employment is not a part of the law of Quebec. We cannot hold a contracting party bound by a law he is not presumed to know. Therefore, on this point the defendant is responsible." And a judgment for the plaintiff was affirmed.

Constitutional Law.]—By s.-s. 2 of s. 16 of the Prince Edward Island Prohibition Act, 1900, "no appeal shall be allowed from any conviction, judgment, or order . . . to any Court whatsoever." In McMurrer v. Jenkins (P.E.I.), 3 E. L. R. 149, it was contended that the violation of a statute is a crime, and, under s. 138 of the Criminal Code, an indictable offence; that an appeal from a conviction for the violation of a statute is a matter of criminal procedure, exclusively within the legislative authority of Parliament; and that, consequently, s.-s. 2 is ultra vires of the provincial legislature. But the Supreme Court en banc, before whom an appeal from a conviction was attempted to be made, refused to entertain it, holding that the sub-section was intra vires. Sullivan, C.J., said that, in accordance with the decision of the Judicial Committee in Attorney-General for

Manitoba v. Manitoba License Holders' Association, [1902] A. C. 73, the Court had held in In re Angus McDonald that the Prohibition Act was within the competency of the provincial legislature, the subject of it being a matter of a merely local nature in the province, and the Act not being repugnant to any Act of the Parliament of Canada. Its provisions respecting prosecutions for violations of it were therefore not "procedure in criminal matters" over which the Dominion Parliament had exclusive jurisdiction, but were "procedure" in a matter over which the provincial legislature has jurisdiction, and incidental to the enforcement of the provincial Act by the imposition of punishment by fine, penalty, or imprisonment, under s.-s. 15 of s. 92 of the B. N. A. Act. Section 138 of the Criminal Code provides a means of punishment for the wilful violation of a federal or of a provincial statute, where no penalty or other mode of punishment is expressly provided by law, but it has no application to a case under an Act which expressly provides a penalty and mode of punishment.

Contempt of Court.]—A magistrate, upon a prosecution under the Prince Edward Island Prohibition Act, had before him a witness who refused to testify; the magistrate adjourned the hearing for 4 days and committed the witness for 8 days. It was held that he had no power to do this, the intention of s. 678 of the Criminal Code being plain, viz., that the witness should be committed during the adjournment only and kept a prisoner in the meantime, unless he should sooner consent to be examined. The witness was accordingly discharged upon habeas corpus: In re Hugh Morrison (P.E.I.), 3 E. L. R. 154.

Damages.]—Richelieu and Ontario Navigration Co. v. Darman (Que.), 3 E. L. R. 128, has surface indications of interest, in that among the head-lines or catch-words are "Explosion of Tea Urn," "Tips to Waiter." Investigation, however, reveals the fact that the decision is nothing more than that an award of $6,000 damages to a waiter upon a

steamboat, who was permanently injured and disfigured by the explosion of a tea urn, was not so excessive that the Court would be warranted in disturbing it. The reference to tips was occasioned by the statement that the waiter's annual income was estimated at $1,080, made up of $360 in wages and board and $720 in tips, or an average of $2 a day in tips!

Husband and Wife.]—The decision of Townshend, J., in Lockett v. Cress (N.S.), 2 E. L. R. 3, noted 26 C. L. T. 748, was affirmed by the full Court: 3 E. L. R. 99.

Judgment.]—The decision of Longley J., in Conrad v. Simpson (N.S.), 2 E. L. R. 53, noted 26 C. L. T. 823, was affirmed by the full Court: 3 E. L. R. 115. The action was upon a judgment. The defence was that the defendant was arrested under an execution issued upon the judgment after an order made under the Collection Act, and that he was discharged from the gaol, possibly by the sheriff, after an imprisonment of three days. It was shewn that the discharge was not authorized by the plaintiff, or his solicitors, and held that the discharge did not constitute a release of the judgment debt.

Landlord and Tenant.]—In Middleton v. Allard (Que.), 3 E. L. R. 144, a judgment directing the cancellation of a lease of a house to be used as a summer boarding house, and awarding the lessee damages, upon the ground that the house was so infested with bugs as to be uninhabitable, was affirmed by the Court of Review. The action was apparently based upon arts. 1614 and 1641 of the Quebec Civil Code.

Liquor License Act.]—In Rex v. Carleton, Ex p. McCrea (N.B.), 3 E. L. R. 57, the full Court held that no appeal lay to a County Court Judge from a conviction for selling liquor without license contrary to s. 62 of the New Brunswick Liquor License Act.——A clause in the Liquor License Act of Nova Scotia defines "liquors" and "liquor" as "all drinkable liquids containing alcohol and all intoxicating drinks." The contention of the defendant in Rex v. Bigelow (N.S.),

3 E. L. R. 101, convicted for keeping "liquor" for sale without a license, was that a drinkable fluid is not a liquor unless it contains enough alcohol to render it intoxicating. The evidence that the "liquor" kept by the defendant (lager beer) was intoxicating was slight, but there was abundant evidence that it contained from 2 to 5 per cent. of alcohol, and the full Court held that this was sufficient to uphold the conviction. An argument was addressed to the Court founded upon the provisions of the statute prohibiting the sale within specified distances of churches and schools or within proclaimed gold districts; but Russell, J., delivering the judgment of the Court, said that if the legislature determined to prohibit within defined areas the sale of liquids containing any alcohol at all, in his opinion the power to pass such a law came clearly within the legislative authority of the provincial legislature.

Malicious Prosecution.]—There has been some discussion and difference of opinion in the Courts of Quebec with regard to the civil responsibility arising from an illegal arrest or prosecution. In a clean-cut opinion delivered in Hetu v. Dixville Butter and Cheese Association (Que.), 3 E. L. R. 120, Taschereau, C.J., reconciles the conflicting lines of decision. He points out that in England (and English criminal law governs in Quebec) the aggrieved party, called the complainant, initiates the prosecution, while in France he simply reports the facts to the public prosecutor, and is in effect nothing more than a witness. But this distinction, he says, does not affect the right to damages, if the prosecution is what in English law would be called malicious and in French law *temeraire* or *calomnieuse*. This is the right of action against the complainant, whether he be regarded as prosecution or *denonciateur*. "But," he continues, "is the burden of proof of fault upon the accused person put at liberty, who claims damages, or must the complainant himself establish that he acted with probable cause? In other words, where is the legal presumption which must be destroyed in order to combat it? The party to a suit, civil or criminal,

is exercising a right, the witness fulfils an obligation. To cause damage to others in the exercise of a right or in the fulfilment of an obligation without fault cannot render one civilly responsible. In England as a complainant party to a suit, in France as a simple witness, the informant is either exercising a right or fulfilling an obligation. It is a principle of law that whoever exercises a right to fulfil an obligation cannot be presumed to be in fault. It is, therefore, for the plaintiff claiming damages to establish that his accuser acted *temerairement* or that his *denonciation* was *calomnieuse.*" In the Eastern Law Reporter an attempt has been made to translate the italicized words, but we think they will be more easily understood as they stand.

EDITORIAL REVIEW.

The Colonial Conference.

Disappointment is felt in some quarters with the results, or want of results, of the Colonial or Imperial Conference recently held in London. For lawyers the chief interest is centered in the discussions as to the mending or ending of the Judicial Committee as a court of final appeal. The following from the London *Law Times* aptly summarizes the situation:—

As was to be expected, after recent signs of the dissatisfaction felt in certain of our colonies in regard to the procedure of the Privy Council, the Premiers took an opportunity of expressing their views upon certain aspects of the subject of appeals. The Commonwealth of Australia proposed, through its representatives, the formation of an Imperial Court of Appeal. The Government of Cape Colony suggested a resolution of much greater length, calling for the establishment of a definite code of rules and regulations, the removal of anachronisms and causes of delay, and the equalization of the conditions giving a right or appeal to His Majesty. It was also proposed that, to remove uncertainty and expense, some portion of the royal prerogative to grant special leave to appeal should be delegated, under definite rules and restrictions, to the discretion of local courts. The conference adopted the Australian proposition, and accepted substantially that of the Cape Colony. The suggestion, however, as to local courts was omitted. General Botha supported the idea that when a Court of Appeal has been established for any group of colonies geographically connected, whether federated or not, to which appeals lie from their Supreme Courts, the legislature of each colony can abolish any existing right of appeal to the Judical Committee; that the decisions of such Court of Appeal should be final as a rule, but that in special cases to be prescribed by statute

leave to appeal may be granted; and that the right of any person to apply to the Judicial Committee for leave to appeal to it should not be curtailed. This was also accepted.

In these resolutions and in their acceptance we may find some explanation and justification of complaints not infrequently heard of late. Mr. Deakin was sufficiently explicit in his observation that the Privy Council was not altogether acceptable in Australia. Sir J. Ward, on behalf of New Zealand, indicated that there is insufficient knowledge of colonial law here, and he suggested that a Judge of the Supreme Court of the colony should sit with the Judicial Committee to strengthen and advise it in this particular. This point was naturally further pressed in the case of South Africa, where the Roman-Dutch law prevails. The general upshot of the debates seems to be an admission that reforms are necessary, but that further consideration is requisite for adapting the machinery to the proposed changes. The Lord Chancellor expressed an opinion that the abolition of the Judicial Committee would not be an advantage, and that its fusion with the House of Lords had not been as yet adequately discussed. These debates will probably end in some modifications of the existing arrangements which may eventually lead the way to the formation of an Imperial Court of Appeal. While difficulties of substance must inevitably be discovered, it is to be hoped that artificial obstacles may not be thrown in the path of those who desire to see the Empire's legal affairs more co-ordinated and simplified.

OFFICIAL RESUME OF THE PROCEEDINGS.

Resolution of Commonwealth of Australia:—

"That it is desirable to establish an Imperial Court of Appeal."

Resolution of Government of Cape Colony:—

"This conference, recognizing the importance to all parts of the Empire of the maintenance of the appellate jurisdiction of His Majesty the King in Council, desires to place upon record its opinion:—

"(1) That, in the interests of His Majesty's subjects beyond the seas, it is expedient that the practice and procedure of the Right Honourable the Lords of the Judicial Committee of the Privy Council be definitely laid down in the form of a code of rules and regulations.

"(2) That, in the codification of the rules, regard should be had to the necessity for the removal of anachronisms and anomalies, the possibility of the curtailment of expense, and the desirability of the establishment of courses of procedure which would minimize delays.

"(3) That, with a view to the extension of uniform rights of appeal to all colonial subjects of His Majesty, the various Orders in Council, instructions to Governors, charters of justice, ordinances and proclamations upon the subject of the appellate jurisdiction of the Sovereign should be taken into consideration for the purpose of determining the desirability of equalizing the conditions which give right of appeal to His Majesty.

"(4) That much uncertainty, expense, and delay would be avoided if some portion of His Majesty's prerogative to grant special leave to appeal in cases where there exists no right of appeal were, under definite rules and restrictions, delegated to the discretion of the local courts."

Mr. Deakin, in moving the resolution of Australia, observed that the Privy Council was not altogether acceptable in Australia, and referred to certain specific cases of recent date. If one uniform court was not possible, Australia desired an Order in Council giving a colony power to transfer its appeals to the Lords if it wishes. This would leave other colonies who desired no change quite free to do as they like.

Dr. Jameson was attracted by the idea of a uniform Appeal Court, provided it contained Judges skilled in Roman-Dutch law, though he did not see any objection to the Privy Council. The Cape resolutions should, he thought, be passed, though the papers shewed that most of the points were being met, and that others could best be met by action

in the colonies themselves. He dealt with the need for a general South African Appeal Court, and said that General Botha would move a resolution.

General Botha moved a resolution, in which the Prime Ministers of Cape Colony and Natal had concurred, and which is printed below.

Sir Wilfrid Laurier observed that the findings of the Privy Council were generally approved in Canada, though there was some division of opinion as to the need for appeals outside Canada at all. He thought that the resolution of Cape Colony was one which might well be approved by the conference.

Sir J. Ward was generally satisfied with the existing arrangements, though he had no objection to a uniform Court of Appeal if found practicable. He suggested that in the case of every appeal from a colony a Judge of the Supreme Court of that colony should sit with the Judicial Committee, but without taking part in the argument or decision, his function being to supply full information as to the colonial law and the points of difference between it and English law. In most, if not all, colonies the number of Judges was such that one could always be on leave, and if he spent his leave in England, or in touch with it, he would be available.

Sir R. Bond thought the appeal arrangements might be made less expensive and more expeditious.

The Lord Chancellor explained, with regard to Mr. Deakin's resolution, that the Judges of the House of Lords Appeal Court are all members of the Judicial Committee of the Privy Council and available for service upon it, together with certain other members, Judges who have had experience in the colonies of all forms of colonial law. He therefore urged that it would not be a real advantage to displace the Judicial Committee of the Privy Council. The fusion of the House of Lords and of the Judicial Committee of the Privy Council had not been adequately discussed in the United Kingdom as a practical measure. He mentioned the

course of business in the Judicial Committee for the last year, which shewed that its business was expeditiously disposed of. With regard to the resolution of the Cape Colony, he said that he thought there would be no difficulty in meeting the wishes expressed in it, and action to that end would be taken. He expressed his full agreement with the suggestion made by Sir Joseph Ward. As regards the South Africa question, there was no objection, but it was a question of machinery for later consideration.

The conference, after further discussion, agreed to the following finding:—

The resolution of the Commonwealth of Australia, "that it is desirable to establish an Imperial Court of Appeal," was submitted and fully discussed.

The resolution submitted by the Government of Cape Colony was accepted, amended as follows:—

"This conference, recognizing the importance to all parts of the Empire of the appellate jurisdiction of His Majesty the King in Council, desires to place upon record its opinion—

"(1) That in the interests of His Majesty's subjects beyond the seas it is expedient that the practice and procedure of the Right Honourable the Lords of the Judicial Committee of the Privy Council be definitely laid down in the form of a code of rules and regulations.

"(2) That, in the codification of the rules, regard should be had to the necessity for the removal of anachronisms and anomalies, the possibility of the curtailment of expense, and the desirability of the establishment of courses of procedure which would minimize delays.

"(3) That, with a view to the extension of uniform rights of appeal to all colonial subjects of His Majesty, the various Orders in Council, instructions to Governors, charters of justice, ordinances and proclamations upon the subject of the appellate jurisdiction of the Sovereign should be

taken into consideration for the purpose of determining the desirability of equalizing the conditions which give right of appeal to His Majesty.

"(4) That much uncertainty, expense, and delay would be avoided if some portion of His Majesty's prerogative to grant special leave to appeal in cases where there exists no right of appeal were exercised under definite rules and restrictions."

The following resolutions presented to the conference by General Botha, and supported by the representatives of Cape Colony and Natal, were accepted:—

"(1) That when a Court of Appeal has been established for any group of colonies geographically connected, whether federated or not, to which appeals lie from the decisions of the Supreme Courts of such colonies, it shall be competent for the legislature of each such colony to abolish any existing right of appeal from its Supreme Court to the Judicial Committee of the Privy Council.

"(2) That the decisions of such Court of Appeal shall be final, but leave to appeal from such decisions may be granted by the said court in certain cases prescribed by the statute under which it is established.

"(3) That the right of any person to apply to the Judicial Committee of the Privy Council for leave to appeal to it from the decision of such Appeal Court shall not be curtailed."

The Colonial Premiers at Gray's Inn.

The Colonial Premiers were entertained at luncheon by the Honourable Society of Gray's Inn on the 11th May last. Sir Wilfrid Laurier and Mr. Alfred Deakin, themselves distinguished members of the Bars of their own colonies, were elected honorary Benchers. The Duke of Connaught, who is a Bencher of Gray's Inn, and the Treasurer, Mr. Reader Harris, K.C., received the guests. After the reception the Treasurer took the chair at the luncheon, and with him at the top table sat the Duke of Connaught, Sir Wilfrid and Lady

Laurier, Mr. and Mrs. Alfred Deakin, Lord Ashbourne (a Bencher of the Inn) and Lady Ashbourne, Lord Collins, Sir Robert Bond, and Mrs. Reader Harris.

The loyal toasts were proposed by the Treasurer, addressing "Mr. Junior."

The Treasurer, in proposing the toast of "The Visitors," said that the members of Gray's Inn were fortunate in being the hosts of such an illustrious company. The object of the gathering was to strengthen an Imperial bond—the bond of law between the Motherland and her daughter States. Their greatest satisfaction was in the fact that they were able to welcome the Colonial statesmen and their ladies—the worthy representatives of those great self-governing nations which formed the British Empire. The bonds of union that linked those nations together were many and strong. A common ancestry, a common destiny, united under one flag, obedient to one law, and last, but not least, loyal to one King, they formed an Empire such as the world had never known—one in aspiration and one in accomplishment. It was with peculiar fitness that they gathered in that hall, for there in all probability the great Queen Elizabeth welcomed the pioneers of that Colonial Empire over which King Edward now reigned. Sir Wilfrid Laurier and Mr. Alfred Deakin, whose names he coupled with the toast, had that day been elected honorary Benchers of that Inn. Their election was proposed by himself as Treasurer, seconded by Master His Royal Highness the Duke of Connaught, and carried unanimously. Many illustrious names would be found on the roll of Benchers of Gray's Inn, but none more distinguished than those of their honoured guests. He hoped that Sir Wilfrid Laurier and Mr. Deakin would long be spared to aid in strengthening and consolidating the mighty Empire which had been created by the courage, wisdom, and devotion of those who had gone before—an Empire which made for righteousness, peace, progress, and law-abiding freedom.

After the toast had been drunk the Under-Treasurer (Mr. D. W. Douthwaite) gowned the new Benchers.

Sir Wilfrid Laurier, in reply, said: "My only words on this occasion must be to offer you my most sincere expression of my feelings concerning the honour which you have done me in admitting me as a member of this ancient and learned body. I also at one time was a lawyer, or at all events I tried to be. To put it more correctly, I was of the Legal Profession, and if it were possible to live again any portion of my life I would go back most willingly to that period when I was a young struggling barrister and, must I add, a budding politician. But I found to my cost that it is difficult to serve two masters, and that the profession of the law, perhaps of all professions, is a very exacting mistress. Having tried to carry on law and politics at the same time, I found that task was beyond my efforts, and, therefore, I gave up law and remained a politician. You have referred to our common heritage and our common ancestry. There is more in your words than perhaps you have intended. We are in possession, and I am here as a witness of it, not only of a common heritage, but a heritage which at the present time is not confined to the kith and kin of Great Britain, but extends to other races, who, like myself, have learned to appreciate British institutions and British law. British law is indeed a bond of Empire, because it has always maintained and secured to every one their entire rights and the entire enjoyment of their privilege and liberties. Of all the honours that have been bestowed upon us on this occasion, may I be permitted to say, and say it with absolute truth, that there is certainly not one which I shall cherish more and which I shall take back to my own country with greater pride than the fact that I have been admitted to this learned body, which has been rendered illustrious by so many eminent names in English history?

Mr. Deakin's acknowledgment was as follows: I realized when, in accordance with established custom, you, Mr. Treasurer, addressed your remarks to "Mr. Junior," that there was no person so justly entitled to bear that honour-

able reference as myself. I have not only the privilege of being the junior among your honorary Benchers, but much the junior of the very eminent constitutional lawyer who has just preceded me. If it be our lot hereafter to encounter the necessary trials which attach to all growing peoples, and which are the evidence of their growth, by which they manifest their capacity to deal with new conditions and conquer them as our fathers, the pioneers to whom you referred, combated the difficulties which beset the earliest years of our Imperial history—if we are enabled to undertake these tasks it will be in part because we are encouraged by your generosity to-day, and are stimulated by the desire not to be altogether unworthy of the gown with which you have been good enough to invest us. I am told by those who sit beside me that the very table at which we are seated and the superb screen at the opposite end of the hall are made of oak salted with the brine and dimmed with the battle smoke in which the foundations of this great Empire were laid. We shall rely on that oak, as the symbol of the law. to outlast, and more than outlast, the generations which are now passing, so long as we are able to pass to each other the torch, still lighted—the torch and lamp of law.

Death of Lord Young.

Lord Young died recently as the result of a fall in the Middle Temple, at the age of eighty-eight. George Young was born at Dumfries in 1819, educated at the local academy and at Edinburgh University, called to the Scottish Bar in 1840, and in 1869 was called to the English Bar by special resolution. He was afterwards elected a Bencher of the Middle Temple. The other notable epochs in his legal career are: Sheriff of Inverness-shire, 1853-60; Sheriff of Haddington and Berwick, 1860-62; Solicitor-General for Scotland, 1862-66 and 1868-69; Lord Advocate 1869-74; Judge of the Court of Session, 1874-1905. Lord Young was a Liberal in politics, and represented the Wigtown Burghs from 1865 to 1874, in which year he was made a Lord of Session. His career as Lord Advocate was all too short to

enable him to win much distinction as a law-maker; for instance, the Cardwell Army reform reduced him to virtual impotence during the whole of the session of 1871. But he did not lack the desire to legislate. A Public Health Act for Scotland stands to his account, and it is on record that he drafted a bill for the abolition of feudal tenure. His draftsmanship, as shewn in the Education Act, was singularly able, and he proved a very effective debater. As director of prosecutions he took a line which was remarkable for its strength and originality; his grasp of the criminal law was unequalled, and, as in his subsequent career on the Bench, Lord Advocate Young was bound by no convention, but only by equity, common sense, and the great principles of jurisprudence. In politics the achievement by which he will be chiefly remembered is the passing of the Scottish Education Act of 1872.—*The London Law Times.*

A Golf Bar Story.

The following golf story, in which the persons involved were a certain eminent and popular member of the High Court Bench in Ireland, and an Irish junior barrister, is said to be new; but the incident, when it is investigated, will doubtless be found to have happened very early in the Stone Age, when the three original jokes, of which all the others are variants, were being perpetrated. The Judge in question was not what could be called a first-class player. He had played the whole course conscientiously, if slowly, and, just as the shades of evening were beginning to fall and he was nearing home, he got badly bunkered. The barrister, who was one of the players immediately behind the Judge, waited for a short time, whilst the Judge slashed at the ball in his efforts to get it out of the bunker. At last, using a familiar phrase in the Irish courts, the barrister called out: "Will your Lordship go any farther this evening?" It is not told what his Lordship's reply was; but doubtless he adjourned the Court till the morning.

The Country Conveyancer Again.

A correspondent vouches for the following drama as a fact. Perhaps it may be regarded as amusing, but there is a grim side to it for the country solicitor.

Scene.—A lawyer's office in a country town in Ontario. Mr. X., seated at his office table, busy. Enter Mr. K., insurance agent, ocean tickets, dealer in raw furs, etc., from his office close by.

Mr. K. loquitur.—"I have a deed of land here which I have witnessed, and wish to swear to. Not being a commissioner, my clerk cannot witness the deeds I prepare."

Mr. X. (gruffly).—"Oh! very well." He takes the deeds, proceeds to administer the oath, completes the affidavit, and hands it back to Mr. K., naming the usual fee.

Mr. K.—"I think, Mr. X., you should do this at half price to the profesh (!) or at all events to me, as I bring you so many.

He lays down on the table a dime.

Explosion from Mr. X. Precipitate retreat of Mr. K. with the dime.

Report of the Inspector of Legal Offices, Ontario.

The report for 1906 was presented on the 20th February, 1907, but the printing and distribution were only recently completed. Pursuant to 6 Edw. VII. c. 19, s. 7, the offices at Osgoode Hall were inspected for the first time. The inspector found a want of adequate vault accommodation, which is not surprising. The statistics are not without interest. We find, for instance, that in 1906 733 actions were tried in the High Court without a jury, and 361 with a jury, 1,094 in all, or an average of 91 for each of the 12 Judges of the High Court. There were 1,289 motions heard by Judges of the High Court in Chambers, 889 motions in Weekly Court, and 522 appeals and motions in Divisional Courts. The Court of Appeal heard 96 cases during the year. Of these 21 appeals were allowed, and 52 dismissed,

in 10 some variation in the judgment below was made, and 13 were standing for judgment at the end of the year.

Judicial Manners.

The article on "Judicial Manners" in the May number of the *Green Bag* is not bad reading. We cull this flower: "A woman lawyer, granted special extension of time, argues for more than a day in favour of the right of women to exercise the elective franchise. As she takes her seat, the Chief Justice says, 'Notwithstanding the able and *exhausting* argument on behalf of the appellant, we believe the judgment must be affirmed.' Surely allowance can be made for such reproof as this. Not even for the dignity of the office would we ask that the Bench endure everything." By an undesigned coincidence, the same phrase "able and exhausting argument," was recently used in a considered opinion by a learned Judge of the Ontario High Court in reference to the argument of a barrister recently called.

The Brief or Factum of Counsel.

We are accustomed to reasons of appeal in our provincial appellate courts, and to the more elaborate factum in the Supreme Court of Canada, but with us the oral argument is still the chief feature of the appeal. It may be that there is too much throwing of the ball backwards and forwards, too much debate between counsel and the Judges. It often seems that the Judges dominate the argument, force it into the channel dug by them or one of them, rather than leave it to flow in the stream of counsel's prepared utterance. It is a treat sometimes to see counsel allowed to present his case as he has arranged it for himself—a treat seldom vouchsafed to the suffering Bar. In sharp contrast to our Canadian methods is the practice of the appellate court (or division) which sits in a magnificent building and richly ornamented chamber close to Madison square in the city of New York. In that court room we recently sat for an hour, during which time the whole of one appeal and parts of two

others were argued, with but one interruption from the Bench, which was to ask if a case cited was in counsel's brief —meaning his written reasons or factum. The five Judges appeared to take but little interest in the oral arguments, and we think we are justified in supposing that they were quite overshadowed by the briefs, which were to be studied before judgment delivered. While our own methods are by no means perfect, we should be sorry to see no interchange of views between the Bench and the Bar.

Recent American Decisions.

Bailment—The proprietor of a bath house, who, for a consideration, furnishes bath rooms, bathing suits, and other accessories of the bath to those who desire to bathe in the sea, and also receives their money, jewelry, or other valuables for safekeeping, is held, in Walpert v. Bohan (Ga.), 6 L. R. A. (N.S.) 828, to be a depositary for hire in relation thereto, and to be liable for loss occurring from want of ordinary care on his part.

Contempt of Court.—The truth of articles published during a trial, tending to prejudice the public and members of the jury, and thereby influence the result, is held, in Hughes v. Territory (Ariz.), 6 L. R. A. (N.S.) 572, to be no defence to a proceeding for contempt.

Contract.—A contract between the proprietors of the only two first-class hotels in the place, to close one, for a money consideration to be paid by the proprietor of the other, in order to give the latter a monopoly of the business, is held, in Clemmons v. Meadows (Ky.), 6 L. R. A. (N.S.), 847, to be contrary to public policy and void.

Insurance.—Acceptance, without reading it, of a fire insurance policy issued upon parol application without any representation as to title, which contains a provision that, except in case of an agreement indorsed on or added to the policy, it shall be void if the subject of insurance be a build-

ing on ground not owned by the insured, is held, in Wyandotte Brewing Co. v. Hartford F. Ins. Co. (Mich.), 6 L. R. A. (N.S.) 852, to be binding upon the applicant, and to bar recovery by him for loss, if the building is on leased property, which fact was not known to the insurer or its agent.

Malicious Prosecution.—A verdict of guilty, set aside and followed by an acquittal, is held, in MacDonald v. Schroeder (Pa.), 6 L. R. A. (N.S.) 701, not to be conclusive evidence of probable cause, in an action for malicious prosecution.

Manslaughter.—A man who failed to furnish medical assistance to his wife during her confinement is held, in Westrup v. Com. (Ky.), 6 L. R. A. (N.S.) 685, not to be guilty of involuntary manslaughter if his failure to secure a physician is due to her insisting that she could manage the case without such aid, and he, after assisting her all he could, and upon discovering her peril, called upon neighbours for assistance, and then secured a physician, whose services did not then prevent death.

Negligence.—Proof of the falling of a trolley pole from an electric car, when it stopped at a usual stopping place, upon a person standing there for the purpose of getting upon the car, is held, in Cincinnati Traction Co. v. Holzenkamp (Ohio), 6 L. R. A. (N.S.) 800, to raise a presumption of negligence on the part of the traction company.

Principal and Agent.—An unsatisfied judgment against the agent of an undisclosed principal is held, in Lindquist v. Dickson (Minn.), 6 L. R. A. (N.S.) 729, not to be a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the fact of agency when he prosecuted his action against the agent.

Will.—The statement of an attesting witness that a testator was not in a condition to make a will is held, in Re Shapter (Colo.), 6 L. R. A. (N.S.) 575, not to impair the effect of his attestation.

BOOK NOTICES.

Barron's Conditional Sales Act, being an Annotation of the Act respecting Conditional Sales of Chattels (R. S. O. 1897 c. 149), and Amendments thereto, to which is Appended a complete Set of Forms. By John Augustus Barron, K.C., Judge of the County Court of Perth, Author of "Bills of Sale and Chattel Mortgages." Second edition. Toronto: The Carswell Company, Limited: 1907.

Since the first edition was issued (in 1889), conditional sales of chattels have become very common in the business of the country, and many cases have been decided upon questions arising under the Act and otherwise bearing upon the subject. After 18 years the learned author has no need to offer an apology for a second edition, for which indeed the time is ripe. It will be found that the work is much enlarged and improved. The first edition contained 118 pages—this has nearly twice as many. The work is excellent and will be useful throughout the whole Dominion. There is a good index and complete table of cases cited.

American Bar Association.—Report of the 29th Annual Meeting, held at St. Paul, Minnesota, on the 29th, 30th, and 31st August, 1906. Part II., containing Proceedings of the Section of Legal Education, Section of Patent, Trade Mark, and Copyright Law, Association of American Law Schools, Conference of Commissioners on Uniform State Laws. Philadelphia: Dando Printing and Publishing Co.: 1906.

PERIODICALS AND PAMPHLETS.

Rome and Law, by A. H. F. Lefroy, of Toronto. This is an article reprinted, in pamphlet form, from the Harvard Law Review. In it Mr. Lefroy maintains the proposition that the true interest of the study of the history of Roman law lies in this, that Romans, through their national practical intelligence, stimulated by external circumstances, and also ultimately by the philosophical theory of a "law of nature," as they conceived it, developed a system of private law which did in fact answer to the true nature of private law, and that they were the first people who did develop such a system.

Columbia Law Review (New York, May and June, 1907). —"Taxation of Movables and the Fourteenth Amendment," by John Bassett Moore; "What is the Police Power?" by Walter Wheeler Cook; "The Function of the Judiciary," by Percy Bordwell; "Spurious Interpretation," by Roscoe Pound; "Larceny and the Perkins Case," by Francis M. Burdick; "Regina v. Ashwell," by Charles R. Lawers.

Michigan Law Review (Ann Arbor, June, 1907):—"A Written Constitution in some of its Historical Aspects," by Andrew C. McLaughlin; "The Beveridge Child Labour Bill and the United States as Parens Patriæ," by Andrew Alexander Bruce; "The Constitutionality of Federal Legislation concerning Employer and Employee Engaged in Interstate and Foreign Commerce," by Carl V. Wisner.

The Green Bag (Boston, May, 1907):—"James Wilson—Nation Builder" (concluded), by Lucien Hugh Alexander;

"The Justification of Fair Competition," by Bruce Wyman; "Judicial Manners," by Ira Jewell Williams; "The Constitutionality of the Beveridge Child Labour Bill," by Edwin Maxey; "English and American Murder Trials," by Lee M. Friedman.

American Law Review (St. Louis, Mo., May-June, 1907):—"Mr. Samuel B. Clarke and the Armstrong Committee's Life Insurance Legislation," by James McKeen; "Evolution of the Law relating to Boycotts," by Robert L. McWilliams; "To What Extent have Rules and Regulations of the Federal Departments the Force of Law?" by Morris M. Cohn; "Due Process of Law," by Hannis Taylor; "Suits against States by Individuals in the Federal Courts," by William Trickett; "The Executive Control of the Legislature" (concluded), by James D. Barnett.

Case and Comment (Rochester, N.Y., May, 1907):—"Dogs on Railroad Track;" "Duty of Medical Care for Others;" "Not Private Business;" "Neglect of Public Duty as a Private Tort."

Albany Law Journal (May, 1907):—"Obscene Literature at Common Law," by Theodore Schroeder; "Monopolies—Modern and Ancient," by William Shafer.

Natal Law Quarterly (31st March, 1907):—"The Doctrine of Consideration as it Obtains in South Africa," by Aurelius; "The Insolvency Law, Natal, No. 47 of 1887," by W. B. Calder.

The Law Magazine and Review (London, Eng., May, 1907):—"Some Recent Copyright Decisions," by J. Andrew

Strahan; "Trusts and the Trade Disputes Act," by D. F. Pennant; "Domicil," by G. Addison Smith; "The Registration of Title in Scotland," by the Rev. H. W. Gibson; "Criminal Statistics, 1905;" "Appeal on Matter of Fact in Criminal Cases," by N. W. Sibley, LL.M.

Criminal Law Notes (Pawatipur, March, 1907.)

Madras Law Journal (February and March, 1907.)

Madras Law Times (22nd, 29th March, 5th, 19th, 26th April, 1907.)

Criminal Law Journal of India (Lahore, 30th March, 15th, 30th April, 15th May, 1907.)

Punjab Law Reporter (Lahore, February-March, 1907.)

Calcutta Weekly Notes (8th, 22nd, 29th April, 6th, 13th May.)

Federal Reporter (National Reporter System, St. Paul, Minn., 11th April, 16th, 23rd, 30th May, 6th June, 1907.)

General Digest American and English (Monthly Advance Sheets, No. 59, April, 1907.)

The Law Student's Helper (Detroit, Mich., April, 1907.)

Law Notes (Northport, N.Y., May, June, 1907.)

Central Law Journal (St. Louis, Mo., 26th April, 3rd, 10th, 31st May, 7th June, 1907.)

Chicago Law Journal (19th, 26th April, 31st May, 1907.)

Chicago Legal News (20th, 27th April, 4th, 11th, 25th May, 1st, 8th June, 1907.)

Law Students' Journal (London, England, May, June, 1907.)

OCCASIONAL NOTES.

Supreme Court of Canada.

EXCHEQUER COURT.] [7TH MAY, 1907.

McLEAN v. THE KING.

Crown—Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer—Cause of action.

A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining, and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased areas to placer miners, who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants.

Judgment appealed from, 10 Ex. C. R. 390, reversed; DAVIES and IDINGTON, JJ., dissenting.

DAVIES, J., dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action.

G. F. Shepley K.C., for the suppliant.

F. H. Chrysler, K.C., for the Crown.

EXCHEQUER COURT.] [13TH MAY, 1907.

PROVINCE OF ONTARIO v. DOMINION OF CANADA.

Constitutional law—Liabilities of province at confederation—Special funds—Rate of interest—Trust funds or debt—Award of 1870—B. N. A. Act, 1867, ss. 111, 142.

Among the assets of the province of Ontario at confederation were certain special funds, namely, U. C. Grammar

School Fund, U. C. Building Fund, and U. C. Improvement Fund, and the province was a debtor in respect thereto and liable for interest thereon. By s. 111 of the B. N. A. Act, 1867, the Dominion of Canada succeeded to such liability, and paid the province interest at 5 per cent. up to 1904. In the award made in 1870 and finally established in 1878, on the arbitration under s. 142 of the Act to adjust the debts and assets of Upper and Lower Canada, it was adjudged that these funds were the property of Ontario. On appeal from the judgment of the Exchequer Court in an action for a declaration as to the rights of the province in respect to these funds:—

Held, affirming the judgment, 10 Ex. C.R. 292, IDINGTON, J., dissenting, that though before the award the Dominion was obliged to hold the funds and pay the interest thereon to Ontario, after the award the Dominion had a right to pay over the same with any accrued interest to the province, and thereafter be free from liability in respect thereof.

Held, also, that until the principal sum was paid over the Dominion was liable for interest thereon at the rate of 5 per cent. per annum.

Sir *Æmilius Irving*, K.C., *C. H. Ritchie*, K.C., and *G. F. Shepley*, K.C., for the appellant.

E. L. Newcombe, and *W. D. Hogg*, K.C., for the respondent.

ONTARIO.] [7TH MAY, 1907.

CONMEE v. AMES & CO.

Broker—Stock—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.

C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock, paying them $3,000, leaving a balance of $6,225 according to the market price at the time. A. & Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock, paying $9,000,

nearly half the price, and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as securities for indebtedness, and later drew on A. & Co. for the balance due thereon, attaching the scrip to the draft, which was returned unpaid, and 475 of the 600 shares were then sold, and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares, with interest and commission:—

Held, reversing the judgment of the Court of Appeal, *A. E. Ames & Co.* v. *Conmee*, 12 O. L. R. 435, which affirmed the judgment in 10 O. L. R. 159, FITZPATRICK, C.J.C., dissenting, that A. & Co. never had the shares for delivery to C. on payment of the amount due by him, and therefore could not recover.

Held. also, that the broker had no right to hypothecate the shares with others for a greater sum than was due from C., unless he had an agreement with the pledgee whereby they could be released on payment of that sum.

The bought note of the transaction contained this memorandum: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."

Held, per DAVIES and IDINGTON, JJ., that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer.

C. Millar, for the appellant.

W. N. Tilley, for the plaintiffs.

ONTARIO.] [7TH MAY, 1907.

BALDOCCHI v. SPADA.

Bankruptcy and insolvency—Transfer of goods by insolvent to creditor—Fraudulent preference—Security to creditor—Knowledge of insolvency—R.S.O. 1897 c. 147, s. 2, s.-ss. 2, 3.

G. had assisted S. with loans and also guaranteed his credit at a bank to the extent of $3,000. His own cheque at

the bank was refused payment until the indebtedness of S. was settled, and the latter promised to arrange it within a month, which he did by transferring to G. a quantity of goods pledged to another bank, G. paying the amount due thereon. Shortly after S. sold out his stock in trade and absconded, owing large amounts to foreign creditors and being insolvent. In an action to set aside the transfer of goods to G. as a fraudulent preference under R. S. O. 1897 c. 147, the manager of the bank which refused G.'s cheque testified at the trial that it was not because the solvency of S. was doubted, but only that he had heard that S. was dealing with another bank, and he wanted the account closed.

Held, IDINGTON and DUFF, JJ., dissenting, that under the evidence produced G. had no reason to suppose that S. was insolvent, and he had satisfied the onus placed on him by the statute of shewing that he had not intended to hinder, delay, or defeat creditors.

Judgment of Court of Appeal, 8 O. W. R. 705, affirmed.

R. McKay and *Gideon Grant*, for the plaintiffs.

J. Tytler and *R. G. Smythe*, for the defendant G.

ONTARIO.] [13TH MAY, 1907.

VALIQUETTE v. FRASER.

Negligence—Construction of building—Contract for construction—Collapse of wall—Building not completed—Vis major.

Held, per DAVIES and MACLENNAN, JJ., that the owner of a building in course of construction owes to those whom he invites into it or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes they are to be put to. Such a duty is not discharged by the em-

ployment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction.

Per IDINGTON, J.:—The fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure.

Per DUFF, J.:—Does the rule governing the duty of occupiers respecting the safe condition of the premises apply without qualification where the structure is incomplete, and the invitee is engaged in completing it or fitting it for its intended use?

Per DAVIES and MACLENNAN, JJ.:—In the present case the failure to guard against the effect of a sudden storm of so violent and extraordinary a character that it could not have been expected, was not negligence for which the owner was liable.

Judgment of the Court of Appeal, 12 O. L. R. 4, and of a Divisional Court, 9 O. L. R. 57, affirmed; IDINGTON, J., *dubitante.*

J. Lorn McDougall, for the appellant.

G. F. Shepley, K.C., and *John Christie,* for the respondent.

ALBERTA.] [7TH MAY, 1907.

LAFFERTY v. LINCOLN.

Constitutional law—B. N. A. Act—Alberta Act, 4 & 5 Edw. VII c. 3 (D.) —Legislative jurisdiction—Con. Ord. N. W. T. c. 52—6 Edw. VII. c. 28 (Alta.)—Medical profession—Practising without license.

Prior to the erection of the province of Alberta by the Alberta Act, 4 & 5 Edw. VII. c. 3 (D.), the College of Physicians and Surgeons of the North-West Territories was incorporated under the Medical Profession Ordinance, c. 52

of the Consolidated Ordinances of the North-West Territories, and its members had the exclusive right to practise medicine and surgery for gain and reward in the North-West Territories of Canada. By the effect of s. 16 (3) of the Alberta Act, the college was continued in existence, subject to being "dissolved and abolished by order of the Governor in council." No order in council was passed to dissolve or abolish the college, but, by the Medical Profession Act of Alberta, c. 28 of the statutes of 1906, the College of Physicians and Surgeons of the Province of Alberta was incorporated, provision made for the registration of members of the College of Physicians and Suregons of the North-West Territories and of other persons, as members of the College of Physicians and Surgeons of the Province of Alberta, giving members so registered the exclusive right to practise medicine, surgery, etc., for gain or reward in the province of Alberta, and prohibiting unregistered persons from so practising under a penalty. The respondent was a duly registered member of the College of Physicians and Surgeons of the North-West Territories, but neglected to register as a member of the College of Physicians and Surgeons of the province of Alberta, and continued to practise medicine, surgery, etc., without the qualification and license required by the Medical Profession Act of Alberta. He was convicted of the offence created by this Act, but, on a case stated, the Supreme Court of the North-West Territories quashed the conviction and declared the Act *ultra vires* of the province of Alberta: *Rex* v. *Lincoln*, 5 W. L. R. 301.

Held, reversing this judgment, that the legislature of the province of Alberta had jurisdiction to enact the statute in question without the formality of an order in council dissolving and abolishing the College of Physicians and Surgeons of the North-West Territories, and that the conviction of the respondent under the Medical Profession Act of Alberta should be affirmed.

Dobie v. *Temporalities Board*, 7 App. Cas. 136, distintinguished.

S. B. Woods and *J. McGregor Young*, for the appellant.

J. A. Allan, for the respondent.

YUKON TERRITORY.] [7TH MAY, 1907.

LAMB v. KINCAID.

Mines and minerals—Placer mining—Disputed title—Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts—Sinister intention—Conversion -- Blending materials—Accounts—Assessment of damages—Mitigating circumstances—Compensation for necessary expenses—Estoppel—Standing by—Acquiescence—Measure of damages.

After a favourable judgment by the Gold Commissioner in respect of the boundary between contiguous placer mining locations, and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products, without keeping any account of the quantities taken from these portions respectively, and appropriated the gold recovered from the whole mass.

In an action for damages subsequently brought, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold.

Held, affirming the judgment appealed from, *Kincaid* v. *Lamb*, 4 W. L. R. 167, DAVIES, J., dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, and that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use, and thereby de-

stroyed the means of ascertaining the respective quantities so taken, and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location.

Quaere: Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations?

J. S. Ewart, K.C., for the appellants.

C. J. Holman, K.C., and *F. L. Gwillim*, for the respondents.

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THE
CANADIAN LAW TIMES.

JULY, 1907.

THE ORIGIN OF MUNICIPAL INSTITUTIONS.

THE word "Municipality" is derived from the Roman word "Municipium," a free town possessing the right of Roman citizenship, but governed by its own laws. This type of community was specially suited to the genius of the Anglo-Saxon people, and towns formed on this self-governing principle, and modelled and protected by royal charters, sprang up rapidly in mediæval England. They played an important part in breaking down the autocratic power of the feudal barons. They contributed, says the historian Robertson, more than any other source to introduce regular government, police, and arts; and they are still the pillars of modern civilization, the hall-mark (if we may change the figure) of our true democracy.

Judge Dillon, in his well known treatise on "Municipal Corporations," traces the origin of municipalities back to very early ages. He finds no trace of municipal organization in the history of the early cities of Phœnicia and Egypt. Great and powerful as were the cities of that famous maritime nation Phœnicia, the sole custodians of power were the merchant princes and traders, whose fleets touched at every port of the then known world. Egypt, too, with her great cities of Memphis and Thebes, the earliest home of learning and the nursery of the fine arts, was not favoured with that free institution, representative or municipal government. The common people were held in servitude by the governing classes. Such a system of civilization could not long endure,

and these two great races now only mark an epoch in the world's history.

It was different, however, with Greece. Although never politically united as a common nation, Greece, in the days of Pericles (her Golden Age), was composed of a number of separate states or cities, free and independent, each the sole source of sovereign authority.

Each city possessed the exclusive management and control of its own affairs. Athens and Sparta were their chief cities—each the birth-place of the freest democratic institutions; Athens, the centre of culture and art, and Sparta, the heroic nurse of manly men and brave-hearted soldiers. Whilst the free people ruled, both were centres of world-wide power. Civic pride was a fetish to them. The whole body of the citizens met in the market-place, the "Agora," and discussed and voted on questions of domestic and foreign policy. This form of government is akin to that in vogue to-day in some of the New England States. In the American "town meeting" the citizens wield a direct influence in the legislative and administrative control of their local affairs. Our nearest analogy to this principle is the plebiscite. This free and democratic form of government produced the same virile and public-spirited government that to-day exists not only in the New England States but in our own country. When the despotism of Macedon had snuffed out the free democratic form of government, these autonomous Greek cities became the mere puppets of the foreign powers.

However, great as is the fame of the Grecian city, the greatest of municipal institutions are to be found in the history of Rome, that fountain-head of most of our laws. Taking its origin in the city by the Tiber, the Roman Republic (and later, the Roman Empire) was but the development and an extension of that city, preserving in many respects the essentially municipal features of the parent government. The bestowal of Roman citizenship upon the conquered races overcome by the on-sweeping "Eagles of

Rome," made those inhabitants members of that great municipal corporation of which Rome was the head. What a pass-word the civilized world over became those words "Civis Romanus Sum," "I am a Roman Citizen"—and with what alarm did the Philippian gaoler who unlawfully scourged St. Paul hear of his Roman citizenship, well realizing the penalty he was liable to for maltreating a citizen of Rome. The conquered people were accorded various degrees of liberty, the municipal towns (municipia) having the full privilege of Roman citizenship, while the "prefectures" and "colonies" enjoyed a lesser freedom. The Roman Republic and Roman Empire were both remarkable for the great power and influence wielded by the municipalities, in which were centred all the wealth and culture of the period. The growth of luxury in the later days of the Empire undermined the manhood of the Romans and degraded the common people, the true foundation of any stable state, into a mere rabble, whose sole ambition and cry was "panem et circenses"—bread and free tickets to the circus—food and free spectacular entertainments—at the hands of their rich patrons and corrupt public men. Sapped of its vitality and self-respect, the Roman nation easily became the prey of the barbarian hordes of Goths and Huns and Visi-Goths who swept the glory of the Roman Empire into oblivion.

The powerful trading cities of mediæval Italy and France afford us additional evidence of the power of individual cities rightly governed and administered: Florence, Venice, Pisa, Genoa, and the cities of the Hanseatic League. The centres of great commerce and wealth, they were also the home of free municipal institutions, and whilst the rights of the people were respected, and whilst the citizens maintained their inherent manhood and self-respect, these cities continued to extend the sphere of their commercial and political ascendance.

Britain was the last conquest of the Romans, and the first of the western provinces upon which they released their

hold. The impressions made by the Romans were not destined to be permanent. According to Macintosh, the historian, Britain was divided into 33 townships by Rome, and enjoyed a certain measure of local self-government. But with the introduction of the feudal system of government in the eleventh century by William the Conqueror, the commonalty of England ceased to have any voice in their own affairs. Henceforth the barons or feudal lords of the soil, each in his own demesne, ruled supreme, whilst owing allegiance to the sovereign lord, the King. The barons in their turn had to fight the battle of popular rights against the encroachments of the King, and at Runnymede they forced King John to sign the Magna Charta, the first substantial recognition of the rights of the people by the sovereign. In the succeeding years, in the great struggles for liberty and law, the towns were always arrayed against arbitrary power.

Says Green, the historian: "In the silent growth and elevation of the English people, the boroughs led the way. Unnoticed and despised by prelate and noble, they had alone preserved or won back again the full tradition of Teutonic liberty. The rights of self-government, of free speech in free meeting, of equal justice by one's equals, were brought safely across the ages of tyranny by the burghers and shop-keepers of the town. In the quiet, quaintly-named streets, in the town-mead and market place, in the lord's mill beside the stream, in the bell that swung out its summons to the crowded borough-mote, the merchant-guild, and church-guild and craft-guild, lay the life of Englishmen who were doing more than knight and baron to make England what she is, the life of their home and their trade, of their sturdy battle with oppression, their steady, ceaseless struggle for rights and freedom. Amongst the towns, London stood chief, and the charter which Henry I. granted to London in 1125 became the model for the rest."

The year 1835 (3 years after the Great Reform Bill) is memorable in the history of English municipal institutions. As the second Lord Grey immortalized himself in the passage of the Reform Bill, so Lord Brougham distinguished himself for the splendid service he rendered municipal institutions by promoting their reform, and by abolishing the self-constituted and self-electing municipal bodies, controlled often by a single individual, and full of as much corruption as were the pocket boroughs of old Sarum. By the Municipal Corporations Reform Act (5 & 6 Wm. IV. c. 76) these municipal corporations were abolished and were re-organized on a uniform basis, the Act laying down the principle that councils should be elected, for short and fixed periods, by the votes of the burgesses, thus recognizing and adopting the representative principle. It will thus be seen that the growth of our municipal institutions has been inseparably intertwined with the growth of the right of popular government.

The municipal law of England is now found in the Consolidation Act, generally known as the Municipal Corporations Act of 1882, with the several amendments thereto since enacted.

As the common law followed the English settlement in the American colonies, it is only reasonable to expect that the elaborate system of municipal government now in vogue in the United States should have had its origin in that great birth-place of modern liberty and free institutions—England —or more properly called out of respect to Scottish prejudice, "Great Britain."

With the revolt of the American colonies from the British Crown came that historic dispersion to Canadian soil of the United Empire Loyalists. These men were more attached to the British Crown than to their own worldly possessions, which they had to leave behind them in the American colonies. They took with them not only their loyalty to the Crown, but also, by the irony of fate, one of

the most cherished institutions of their American home, local self-government and municipal institutions. The "American Invasion" which the devoted loyalists unwittingly brought with them, was a blessing in disguise. The bulk of the loyalists come from the State of New York. They sought an asylum of liberty, as they believed, on British soil. To their sorrow they found that the Union Jack did not then wave over a land as full of liberty and free institutions as they had fondly hoped. Great Britain's colonial policy in dealing with the American colonies, we are now agreed, was suicidal in her own interests. Equally short-sighted was her policy in dealing with her Canadian colony. The aristocratic and autocratic governors whom she sent out to Canada were filled with a profound distrust of the principle of local self-government. To them, looking over at the American colonies, it spelt treason. Under the French Canadian system, as defined by the Quebec Act, there was absolutely no provision made for any municipal government. Thanks to the persistence of the loyalists who on the other side of the line appreciated the benefits of representative government, and aided by the English element already in the colony, the Constitutional Act of 1791 was passed, dividing Canada into Upper and Lower Canada, and assigning to each a representative assembly under a separate Governor. Magistrates' commissions were now issued to several of the loyalist officers to preserve the peace and settle minor differences. Their duties, at first purely legal, were afterwards expanded, and a more extended system of local government was devised, under which the western settlements were in 1788 divided by Lord Dorchester into four districts—Lunenberg, Mecklenberg, Nassau, and Hesse. Courts of Quarter Sessions were then organized and began their sittings. Governor Simcoe, on coming to Upper Canada in 1792, found these Courts of Quarter Sessions in operation. Their powers were not only judicial, but legislative and administrative —the first approach to local self or municipal government in Upper Canada. Governor Simcoe, in order to "promote

an aristocracy, most necessary in this country," as his report to the home government so naively reads, appointed, from the Legislative Council, lieutenants of the populous counties. The home government, averse to the principle of local self-government, vetoed this action of Simcoe, who was shortly afterwards replaced by Governor Russell. Under Russell began the growth of those personal and corporate interests, which blossomed forth into the "Family Compact." Before this shrine of aristocracy, so needed, as the "Compact" thought, in this plebeian Canadian land, so long in vain ascended the bitter cry for self-government, a cry so insistent that it took the shedding of the best blood of our Canadian ancestry to appease. And not until the plain people, headed by those heroic if misguided men, Papineau and McKenzie, arose in arms, did this high-handed aristocratic clique, who imagined their presence on Canadian soil was necessary for the maintenance of the British connection, accord to the plebeian portion of our commonwealth those inherent rights of British freemen, the rights of self-government and of representative institutions.

It is interesting to note at this juncture that at a prior date, by royal proclamation of Governor Simcoe, the first Annual Fair in Canada was held in Newark (Niagara), in 1792, and the first Canadian market was established in 1802 in York (Toronto). Kingston, being the first commercial town of Upper Canada in 1812, had already discussed the question of incorporation, but the war of 1812 knocked that on the head. In 1816 the first Public Schools Act for Upper Canada was passed. In 1817 Kingston, York, Sandwich, and Amherstburg were incorporated, and in 1832, Hamilton. The first real measure of municipal government in Canada was passed in 1841. It was passed on the recommendation of Lord Durham, in his famous report of 1839. The Act of 1841 was, however, only a compromise measure.

In 1843 the Hon. Robert Baldwin, that valiant champion of the rights of the plain people of Canada, was Prime Minister.

He introduced a bill to establish complete self-government in all forms of municipal corporations in Upper Canada. The bill passed the Assembly, but was suppressed by the council, and the Governor, Lord Metcalfe, who was at daggers drawn with Mr. Baldwin. No further move was made until Mr. Baldwin again came to power in 1849, when under the able and enlightened administration of Lord Elgin, father of the present Colonial Secretary, Mr. Baldwin introduced and finally carried that famous Municipal Act of 1849, commonly known as the Baldwin Act. Scarcely a session has since passed without some amendment being made to it, yet in all its essential principles its spirit and purpose are embodied in our present municipal system throughout the several provinces of the Dominion. It is generally conceded that the Baldwin Act is the Magna Charta of our Caandian municipal government. None of those dire disasters which Lord Metcalfe vainly imagined would follow in the wake of representative government have come to pass. It provided in a most comprehensive and workman-like way for all the legislative and administrative machinery now found in main in the Ontario Municipal Act, and in a large measure in our British Columbia Act. Many defects may, no doubt, have from time to time crept into our municipal system of government. We should always remember that the chief function of a municipal corporation is to govern and to regulate. Perhaps in some cases we have gone far afield from this basic principle of municipal government, and the legislature may have given to municipalities too ample powers in the matter of allowing them to wield at their own untrammelled discretion the right of granting bonuses, of creating funded debts, of inaugurating certain costly public works. It would be better for all municipalities if the legislature were to withdraw the power to bonus. We should then be freed from the wiles and persuasive eloquence of the bonus hunter. Some prominent writers on municipal matters like Professor Goodnow, in his Municipal Problems, c. 6, argue for the necessity of a central control of municipal government.

Some recent writers advocate election of members of municipal councils for a longer term than one year. It is argued that the turmoil of annual elections prevents many able men from entering the arena of municipal life. In the province of Quebec the councils of parishes, townships, towns, villages, are composed of seven men elected for three years; two councillors must be elected or appointed two years consecutively and three every three years. The principle of granting certain municipalities special charters is not in harmony with modern English precedent since Lord Brougham's Act of 1835. In England the Municipal Act applies to all municipalities, except London, whose charter was first issued in the 12th century. The greatest danger that history shews all representative government (including municipal government) has to fear, is the apathy and indifference of the citizens in the affairs of government. We are fast becoming a corporate age—in our commercial as well as in our municipal affairs; and we are delegating more and more the exclusive administration of our affairs to others, and not taking the trouble to investigate matters for ourselves. Hence arise many abuses which only the personal interest and self-sacrificing loyalty of the citizens can correct. Good government is only to be secured by the active co-operation of good citizens in the government of the municipality. The governments of Glasgow and Berlin afford us noble examples of how well and faithfully even great cities may be governed and administered. Each of these cities is distinguished by the loyalty and rectitude of its public servants, by the zeal and co-operation of the mass of citizens in the affairs of the government. A government will measure up to the standard of the people on which it rests for its support. If the spirit of the people is clean and self-sacrificing, and its tone high-minded, these qualities will be reproduced in the character of the men guiding the government. And equally true is the converse of the above proposition.

I have tried to give a running sketch shewing the history of municipal government and organization which, as I have

pointed out, has been so closely connected with the history of representative government in general. When we see the long struggles that have had to be waged to ensure this blessing of civilization, we may be more prone to value it accordingly.

J. D. SWANSON.

Kamloops, B.C.

RECENT CASES FROM THE TIMES LAW REPORTS.*

Company.]—John Harwood Cash, having been employed by John Cash and Sons (Limited) as one of its managers, left the service of the company, and in conjunction with others formed a company called Harwood Cash and Co. (Limited), with the object of carrying on a business similar to that of the old company, and in the same place. In an action to restrain the new company from carrying on business under that name, it was held that, although Harwood Cash was entitled on leaving the old company to carry on business in his own name, if he chose, next door, the incorporation by him of a company did not confer on that company the rights which he as an individual might have with reference to the use of that name, and an injunction was granted: Fine Cotton Spinners' and Doublers' Association (Limited) and John Cash and Sons (Limited) v. Harwood Cash and Co. (Limited), 23 T. L. R. 537.

Estoppel.]—The knowledge of an agent is treated as knowledge of the principal in a case where an insurance agent took a proposal for insurance from the plaintiff, a joiner and builder, describing him in the form as a joiner. The plaintiff refused to take the policy with that description in it, and it was altered by the agent, with the sanction of the chief clerk of the insurance company's branch office, by inserting the words "and builder," whereupon the plaintiff paid premiums. The insured had been, to the knowledge of the agent, for many years a joiner and builder. In an action on the policy it was held that the contract must be treated as having been negotiated with a joiner and builder, and not with a joiner only, and in that sense the knowledge of the agent was the knowledge of the principal: Holdsworth v. Lancashire and Yorkshire Insurance Co., 23 T. L. R. 521.

* Including cases reported in the number for the week ending June 4, 1907.

False Representations.] — The decision of the Judicial Committee of the Privy Council in Barrette v. Le Syndicat Lyonnais du Klondyke, reversing the judgment of the Supreme Court of Canada, 36 S. C. R. 279, is reported in 23 T. L. R. 532.

Maintenance.]—In Holden v. Thompson and others, 23 T. L. R. 529, it is held that a contract made between the committee of a religious society and a solicitor, by which he agreed to act for certain persons who were resisting proceedings taken by a religious institution to recover the custody of certain children removed from the institution, is not void on the ground of maintenance. The defendants were in sympathy with the religious views of the relatives of the children, who were not persons of means, and instructed the plaintiffs' firm to act for the relatives of the children in resisting the proceedings for recovery of the children's custody. The contract was held to come within the exception of charity, the charity being the result of religious sympathy.

Master and Servant.]—Harris v. Fiat Motors (Limited), 23 T. L. R. 505, is another case giving point to the rule that a question not raised as a defence at the trial nor on the appeal from the decision of the trial Judge cannot be raised afterwards. A driver of a motor car who had been instructed by the defendants not to give up the driving to any one, intrusted the driving to a companion while he went to see what was the cause of a noise at the back of the car. It was held that the question as to the necessity for his intrusting the driving to another could not be raised for the first time upon appeal.——In Cribb v. Kynoch Ltd., 23 T. L. R. 550, the doctrine of common employment is carefully considered in its application to the case of the employment of an infant where there is a duty to warn the servant of danger, and the master has delegated that duty to another in his employment, and that other has been negligent in not giving the proper warning. The plaintiff, a girl of 15 years of age, was employed in a factory where explosives were made,

and was put at a dangerous work. Owing, as it was found, to the negligence of the forewoman in not sufficiently warning her, the plaintiff was injured. To meet the defence of common employment, it was urged on behalf of the plaintiff, as an exception to the doctrine, that there is on the part of the master a personal duty to be performed which, in dangerous employments and in the case of an infant, he cannot delegate to others. After reviewing all the authorities, the Court (Ridley and Bray, JJ.) declined to accede to this argument, and the action, having been based entirely on common law liability, was dismissed.

Misrepresentation.]—The plaintiff in Kettlewell v. Refuge Assurance Co., 23 T. L. R. 506, was held entitled to recover four years' premiums upon a policy of insurance on the life of another, which she had paid in consequence of untrue representation by the defendants' agent that when she had paid these she would be entitled to a policy free of any future premiums or to a return of the premiums paid. The ground of the decision is, not that the defendant company were bound by the representations of their agent so as to make them liable for damages, but that they could not keep the premiums which the plaintiff was induced by the fraud of the agent to pay.

Railway.]—Upon the construction of a provision in the Railway and Canal Traffic Act analogous to s.-s. 7 of s. 284 of the Railway Act, R. S. C. 1906 c. 37, the Court of Appeal held that a carrier is liable for the loss of a case of samples belonging to a commercial traveller received by the carrier as passenger's luggage, where the loss resulted from negligence, notwithstanding a condition in the railway company's time-table that the company should be relieved from all liability for loss, damage, misdelivery, or delay: Wilkinson v. Lancashire and Yorkshire R. W. Co., 23 T. L. R. 509.

Treason.]—DeJager v. Attorney-General for Natal, 23 T. L. R. 516, an application for leave to appeal to the

Judicial Committee of the Privy Council from a decision of the special Court constituted in Natal in 1900 for the trial of cases of treason, by which the petitioner was condemned for high treason, is a most interesting case, deciding that an alien resident in British territory owes an allegiance to the Crown which does not cease if the country of which he is a subject is at war with this country and temporarily occupies that part of British territory in which the alien resides and the British forces temporarily retire therefrom. Their Lordships point out that if it were otherwise "a small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed."

Will.]—In In re Wedmore, Wedmore v. Wedmore, 23 T. L. R. 547, a point is decided which was not previously covered by authority. A testator by his will gave to his daughter the sum of £3,000 in satisfaction of his covenant to pay £1,000 to the trustees of her marriage settlement, and the question arose whether the legacy ought to abate. Mr. Justice Kekewich, referring to the rule that where a legacy is given to a widow in lieu of dower, the Court considers her a purchaser of the legacy, and the legacy therefore does not abate, was of opinion that it was impossible to apply to such a case as this the same considerations which applied to dower, and decided that the legacy abated with the other legacies.

THE LATEST ONTARIO DECISIONS.*

Assessment and Taxes.]—The Court of Appeal in Ottawa Electric R. W. Co. v. City of Ottawa, 10 O. W. R. 138, held,. reversing the judgment of Teetzel, J., 7 O. W. R. 481, noted 26 C. L. T. 339, that a large storage battery of the plaintiffs, made up of segments, resting of their own weight upon, but not attached to, the floor of the building in which it was situated, and put in use by the application of a wire to a slot and the turn of a thumbscrew, and whose purpose was to regulate the supply of electric current, and to provide surplus power in case of temporary failure of the dynamos, was to be regarded as personal property used in and about the working of the railway within the meaning of ss. 18 and 52 of the agreement between the parties, and that the matter in question is not to be tested by the rules applicable in cases of vendors and vendees, mortgagors and mortgagees, or even landlords and tenants.

Bankruptcy and Insolvency.]—The decision of Teetzel, J., in Wade v. Elliott, 10 O. W. R. 206, is authority for the proposition that, where there is a bona fide agreement by a debtor to give security, a chattel mortgage honestly given, without knowledge on the part of the mortgagee of insolvency of the debtor and without an intention of giving an unjust preference over other creditors, is valid, though not if there be an agreement that such mortgage shall not be registered, and it be unregistered.

Banks and Banking.]—It is decided by Boyd, C., in Peterborough Hydraulic Co. v. McAllister, 10 O. W. R. 109, that, notwithstanding s. 76 (2a) of the Bank Act, R. S. C. 1906 c. 29, it is competent for a bank to acquire the lease-

* Short notes of the most important cases in Volume X. of the Ontario Weekly Reporter, Nos. 1, 2, 3, 4, 5, pp. 1 to 212, inclusive.

hold or other property of its debtor, absolutely, in satisfaction of the debt, and, as subsidiary to the favourable or profitable disposal or sale of such property as a mill, to keep it as a going concern for a reasonable time.

Company.]—It is decided by Boyd, C., in Martin v. Gibson, 10 O. W. R. 66, on the principle that "equality is equity," that directors of a company have no power to allot all of a new issue of capital stock among themselves to the exclusion of the other shareholders. The Act of incorporation of the company in question disqualified the majority from exercising control in certain cases unless that majority be of at least two-thirds in value of all the shareholders. After issuing a portion of the new shares which had the effect of giving such two-thirds majority, the directors issued a circular requiring minority shareholders to state whether they desired to increase their holdings, but on such terms that such shares should be allotted by the directors as to them might seem desirable and necessary. This limited opportunity is held not to preclude the minority shareholders from asserting their rights by action.——The plaintiff in McCarter v. York County Loan Co., 10 O. W. R. 165, was lessee of property of the defendants under a lease containing a clause: "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same terms as in said offer." The property was sold and conveyed to one Halligan without the submission mentioned having been made. Mabee, J.: "The liquidator seems to be somewhat in the position of a receiver or agent appointed by the Court to represent the company for the purposes of the Act, not as an assignee, but as the statutory representative of the company for the purposes of the winding-up. The liquidator has power, with the approval of the Court, to sell the real estate of the company; in this case the liquidators were authorized to sell the property in question; they could sell only subject to the terms and conditions of the plaintiff's

lease; possession could only be given upon expiry of the plaintiff's term; and the provision regarding the plaintiff's right to purchase was, I think, equally binding upon the liquidators. When the liquidators obtained the offer from Halligan, it was in effect the company, which was still in existence, obtaining the offer, and, having obtained such offer, the liquidators, I think, were bound to submit it to plaintiff in accordance with the terms of the proviso in the lease."

Contempt of Court.]—An appeal by the defendants in Copeland-Chatterson Co. v. Business Systems Limited, from the order of Mulock, C.J., 9 O. W. R. 610, noted ante 374, was dismissed by a Divisional Court: 10 O. W. R. 92.

Contract.]—Chalk v. Wigle, 10 O. W. R. 146, is the latest of a long line of cases in which a child, or one standing in the position of a child, has been held entitled to recover against the parent for services rendered. The plaintiff was the adopted son of the defendant, a farmer. There was no dispute about the rendering of the services, and there was practically no dispute upon the evidence that the services were not intended to be gratuitous. The Court of Appeal held that there was no express contract, but the services were to be paid for, and the plaintiff was entitled to recover upon a quantum meruit. Meredith, J.A., dissented.

Costs.]—A Divisional Court in Moffat v. Carmichael, 10 O. W. R. 72, held that the plaintiff's costs of the action, in which $140 was recovered for injury to the plaintiff's house by the negligent and improper severance of the defendant's house from the plaintiff's, both having been built together, should be taxed upon the High Court scale. It was held that the disturbing of the plaintiff's easement was damage to her land, and that the test as to whether the County Court has jurisdiction in such case under R. S. O. 1897 c. 55, s. 23 (8), is the value of the land and not the amount of the damage sustained.——In Hamilton v. Hamilton, Grimsby,

and Beamsville Electric R. W. Co., 10 O. W. R. 197, an action for damages for personal injuries, where no defence was made, and the matter came on for trial or assessment of damages at the Hamilton assizes, where the matter occupied 6½ hours, and the plaintiff was awarded $7,500, which was affirmed on appeal, Falconbridge, C.J., upheld the certificate of the taxing officer allowing a counsel fee of $125 at the trial under item 153 of the tariff, instead of $10 under item 152. No interlocutory judgment had been signed.

Court of Appeal.]—Though the jurisdiction is to be exercised sparingly and with caution, the Court of Appeal has decided in Embree v. McCurdy, 10 O. W. R. 131, that it has jurisdiction to pronounce an order to prevent an appellant, pending an appeal, from actually making away with the property in question, and from dealing with it in a manner which manifestly must result in loss or in jeopardizing its safety, and especially where such order, if asked for at the trial, would have been granted almost as a matter of course.

Deed.]—The defendants' appeal in Owen v. Mercier from the judgment of Boyd, C., 12 O. L. R. 529, 8 O. W. R. 151, noted 26 C. L. T. 590, was allowed by the Court of Appeal, for the reasons that the transaction between the plaintiff and the defendant the vendee had been completed by the signing, sealing, and delivery of the deed in question; that the fault in the description was such as would cause only a latent ambiguity, which might be removed by extrinsic evidence; and that the condition inserted by the plaintiff was ineffectual, being without the consent of the vendee and after the execution of the deed: 10 O. W. R. 1.

Division Court.]—Falconbridge, C.J., has decided in Re Shupe v. Young, 10 O. W. R. 185, that a provision in a contract whereby the defendant waived his right to the benefit of the statute 6 Edw. VII. c. 19, s. 22, was ineffectual, since

such waiver is itself a "proviso, condition, stipulation, agreement, or statement," which provides for the place of trial, and therefore a violation of the Act.

Equitable Assignments.]—The documents under which the plaintiffs in Sovereign Bank v. International Portland Cement Co., 10 O. W. R. 161, claimed read: "To Corp. Town of Perth: We hereby assign, transfer, and set over to the Sovereign Bank of Canada any money or moneys due or which may become due from the corp. of the town of Perth." And: "To the Corporation of the Town of Perth and to the Sovereign Bank of Canada, Perth. We hereby for and in consideration of advances heretofore made to the undersigned, assign, transfer, and make over to the Sovereign Bank of Canada, Marmora branch, as a general and continuing collateral security, balance of the account against the corporation of the town of Perth now assigned to the Sovereign Bank of Canada, Perth branch." These were held by Riddell, J., to be good equitable assignments and to entitle the bank to the moneys in question, paid to the sheriff under the Creditors' Relief Act, as against execution creditors of the assignors.

Evidence.]—Upon an examination as a witness upon a motion pending of a solicitors' clerk, who is a party to the action and has allowed his name to be used by the solicitors, in whose possession the documents and correspondence respecting the transactions in question are, the witness is held by Riddell, J., in Clisdell v. Lovell, 10 O. W. R. 203, bound to make all proper investigation to enable him to produce all documents in his power, and must produce all copies of letters written by those who used his name which are properly admissible in evidence.

Executor.]—An appeal by the plaintiff in Bartram v. Wagner from the judgment of Meredith, C.J., 9 O. W. R. 448, noted ante 378, was dismissed by a Divisional Court: 10 O. W. R. 41.

Foreign Divorce.]—An interesting question was raised in Re Williams and Ancient Order of United Workmen, 10 O. W. R. 50. One of the claimants had been the wife of the insured, and it was alleged was deserted by him in Massachusetts, upon which she there obtained a divorce, but nevertheless claimed the insurance moneys as his wife. The decision in Le Mesurier v. Le Mesurier, [1895] A. C. 517, that " the permanent domicile of the spouses within the territory is necessary to give the Courts jurisdiction to divorce a vinculo, so that its decree to that effect shall, by the general law of nations, possess extra-territorial authority," raised the question whether the deceased would be allowed to assert for the purposes of the claimant's suit for divorce that he had ceased to be domiciled in Massachusetts. Anglin, J., thought it doubtful if the divorce could be recognized outside the state where it was granted, but found it unnecessary to decide the point because he considered this claimant ought not to be heard to impugn the jurisdiction which she had invoked.

Foreign Judgment.]—The decision of a Divisional Court in Vezina v. Will. H. Newsome Co., 10 O. W. R. 17, in an action upon a judgment obtained in the province of Quebec, is based upon the conclusion arrived at by the Court that 22 V. c. 5, s. 58, has been repealed by the legislature of the province of Quebec, so that a judgment obtained in that province against a defendant not having his domicile there, will not be recognized by the Courts of the province of Ontario, where the service of the originating summons or process has not been personal, and no defence has been made as provided by 23 V. c. 24 (R. S. O. 1897 c. 51, ss. 117 and 118).

Fraudulent Conveyance.]—In the absence of any fraudulent intent and of any circumstances raising a suspicion of fraud on the part of the defendant, other than her mere knowledge of a judgment having been recovered against her husband for breach of promise of marriage, Mabee, J., accepted her evidence that she would not have entered into the

marriage had the ante-nuptial settlement attacked by the judgment creditor, not been made, and dismissed the action brought to set it aside: Fallis v. Wilson, 10 O. W. R. 121.

Gift.]—Mrs. P. deposited $3,000 with the Toronto General Trusts Corporation, in the names of two sisters and a sister-in-law, $1,000 for each, and asked that these moneys be placed to the credit of these three persons in the same manner as a fund held by the company for herself. An acknowledgment of having received $1,000 each from the three persons was given her by the company, which she retained, but she informed the beneficiaries of what she had done. The interest was paid by cheques in favour of these beneficiaries, who, however, during Mrs. P.'s lifetime, indorsed such cheques to her and she received the money. Anglin, J., held, notwithstanding the retention of the receipts and the disposition of the interest, that, in all the circumstances, the settlor had done everything which, according to the nature of the property, was necessary to be done in order to transfer the property and render the settlement binding, and that there was a complete and executed trust created by Mrs. P. enforceable by the defendants, though volunteers, against her executors: Toronto General Trusts Corporation v. Keyes, 10 O. W. R. 86.

Habeas Corpus.]—In Rex v. Harrison, 10 O. W. R. 35, a motion was made for the discharge of a prisoner on the return of a habeas corpus. The prisoner being in custody under a conviction of a County Judge's Criminal Court, which is constituted a court of record by R. S. O. 1897 c. 57, Teetzel, J., dismissed the motion, saying, in part: "I think the prisoner should be remanded to gaol for sentence, on the ground that the writ should not have been issued in the first instance, because it would appear that the writ is not properly issuable under the Act respecting habeas corpus, R. S. O. 1897 c. 83, s. 1, where the prisoner is in custody by virtue of a conviction or order of a court of record: Regina v. St. Denis, 8 P. R. 16; Regina v. Murray, 28 O. R. 549."

Innkeeper.]—Upon an instructive review of the authorities, Gorham, Co. C.J. of Halton, in Fraser v. McGibbon, 10 O. W. R. 54, held that the defendant was liable in damages for the loss of the plaintiff's coat. The conclusions of the Court are summarized in the following: "The defendant, by holding himself out as a hotelkeeper or innkeeper and his house as a common inn, invited the plaintiff as one of the travelling public to become a guest. The plaintiff accepted that invitation and entered the hotel with the intention of becoming such. He did not see nor learn of any notice nor have any knowledge that the defendant had provided a room and a man in charge where and with whom he could leave his coat, but, seeing others whom he speaks of as guests, hanging their coats on hooks evidently provided for that purpose in the office or public room, hung his coat there also. The defendant must be taken to know that the plaintiff had accepted the invitation and offered himself as a guest and hung his coat where he did. There was no need for the defendant to, by any act or word, signify that he accepted the plaintiff as his guest. If he did not wish to accept him as such, he should have, when the plaintiff entered the inn, so notified him."

Landlord and Tenant.]—In Peterborough Hydraulic Co. v. McAllister, 10 O. W. R. 109, it is held by Boyd, C., that the Ontario Bank, having entered into an agreement for the assignment to the bank of the defendants' lease of a mill property, and a power of attorney having been given to the local manager to execute any deed of surrender or assignment of such lease, and the defendants having procured the lessor's assent to an assignment of the lease to a third party, had secured the potential power to control the possession and usufruct of the property so as, in the circumstances, to create the implied obligation to indemnify the defendants against the payment of rent under the lease. It was also decided that the bank were estopped from asserting that the taking over of the defendants' business as a going concern

was ultra vires, and that, the act of the agent of the bank in executing the agreement in question having been adopted and ratified by the bank, it could not be said that he had acted without authority.

Limitation of Actions.]—It is decided by a Divisional Court in Patterson v. Dart, 10 O. W. R. 79, reversing the decision of MacMahon, J., 8 O. W. R. 800, that s. 19 of the Real Property Limitation Act does not cover the case of an express agreement which applies the future rents to be received by the mortgagee and gives a right of redemption at the time the last rents are so applied.——The point decided by Riddell, J., in Birkett v. Bissonette, 10 O. W. R. 171, is that payments by the assignee of a debtor for the benefit of creditors, under an assignment in the usual form, upon a simple contract debt, have not the effect of tolling the Statute of Limitations. Part payment is not sufficient to take a case out of the statute, unless it be such that a jury might fairly infer a promise to pay. The assignee has no authority to make such promise.

Lord's Day Act.]—The defendant in Rex v. Devins, 10 O. W. R. 11, was convicted under C. S. U. C. 1859 c. 104, s. 1, for selling candies and oranges on Sunday. It appeared that he was a bona fide restaurant keeper, and sold among other things candies and oranges. Morson, Jun. Co. C.J. of York, upon appeal under s. 1 of c. 10 of 4 & 5 Edw. VII., quashed the conviction, holding that, as candies and oranges are food, a bona fide restaurant keeper has a right to sell them on Sunday, and that, as the offence is in the selling and not in the eating, it does not matter whether such articles are eaten upon the premises or not.

Malicious Prosecution.]—An appeal by the defendant in Still v. Hastings from the order of a Divisional Court, 9 O. W. R. 121, 13 O. L. R. 322, noted ante 191, was dismissed by the Court of Appeal: 10 O. W. R. 10.

Mines and Minerals.]—While the working permit application of the company in Re Isa Mining Co. and Francey, 10 O. W. R. 31, did not comply with the conditions prescribed by s. 141 (11) of the Mines Act, in that the affidavit accompanying it did not negative the matters required to be negatived, but, on the contrary, shewed that there were adverse claims, to the knowledge of the applicants, and should therefore not have been received by the Mining Recorder, a Divisional Court, being of the opinion that the Mining Commissioner had no jurisdiction to order the application to be cancelled, on appeal by the company set such order aside.—— Appeals by the defendant Smith in Munro v. Smith, Mackie v. Smith, and Richardson v. Smith, from the orders of Anglin, J., 8 O. W. R. 452, noted 26 C. L. T. 805, were dismissed by a Divisional Court: 10 O. W. R. 97.

Municipal Corporations.]—Two points are decided by Britton, J., in Re Halliday and City of Ottawa, 10 O. W. R. 46, upon the construction of the Ontario Shops Regulation Act, R. S. O. 1897 c. 257: that the provision as to passing of the by-law within one month after the presentation of the application or petition is only directory; and that petitioners have a right to withdraw from the petition at any time before the first reading of the by-law. It was held in the latter connection, distinguishing the case from Gibson v. Township of North Easthope, 21 A. R. 504, 24 S. C. R. 707, that here there is no quasi-contract as in cases of local improvements where property is to be benefited and is to be assessed for a portion of the expense.——The terms of a settlement between the plaintiff and defendants in Leslie v. Township of Malahide, 10 O. W. R. 199, besides fixing a sum to be paid by the defendants in full of the plaintiff's claim, embraced a promise by the plaintiff to assume and pay the costs of the reference, and a promise by the defendants to assume and pay all the other costs of the action. Teetzel, J., held that this settlement not being under the seal of the defendant corporation or authorized by by-law under seal, and

being, in part, executory, was not enforceable against the defendants.

Parent and Child.]—The decision of a Divisional Court in Empey v. Fick, 13 O. L. R. 178, 9 O. W. R. 73, noted ante 193, was affirmed by the Court of Appeal: 10 O. W. R. 144.

Partnership.]—The defendants, Dingman and Coulter, having agreed to become associated and engaged in a commercial enterprise, viz., that of operating a company, with an agreement that they should share the profits derived from it, were held by a Divisional Court to be, in the circumstances, more than promoters, and to be partners so as to render Coulter liable for the price of goods purchased on the joint account by Dingman: Howard Stove Manufacturing Co. v. Dingman, 10 O. W. R. 127.

Promissory Note.]—An instrument in the form of a promissory note, bearing the ostensible maker's signature, but delivered as a copy of a note that had been withdrawn, and which had the word "copy" written across the scroll work at the end, and which when sued upon had had that word and the scroll work neatly cut off, was held by the Court of Appeal in Wilson v. Pearson, 10 O. W. R. 156, not to be a promissory note, and the defendant was held not to be estopped from proving that fact, since the instrument he gave was, in its then form, a perfectly innocent affair, and could only be made effective as a note by the commission of a crime, which the defendant was in no way bound to anticipate.

Railway.]—The defendants in Lumsden v. Temiskaming and Northern Ontario R. W. Commission, 10 O. W. R. 115, and their contractor, before the filing of the plans, entered upon the timber limits of the plaintiff and cut certain timber. Admittedly this was done in the course of constructing the projected railway. These acts continued down to a later period, but ceased much more than 6 months before the issue of the writ in the action, which was for

damages for the cutting and taking away of the timber. Riddell, J., held that the Act of incorporation, 2 Edw. VII. c. 9, providing that the Commission in respect of the railway should have all the immunities conferred upon any railway company by the Railway Act of Ontario, the damages claimed were "sustained by reason of the railway," on the authority of McArthur v. Northern and Pacific Junction R. W. Co., 15 O. R. 733, 17 A. R. 86, and dismissed the action.

Street Railway.]—The plaintiff in Hackett v. Toronto R.W.Co., 10 O.W.R. 25, a boy, was stealing a ride on a car of the defendants going east, and was sitting on the draw-bar at the rear of the car. Arriving near the place to which he wished to go, he alighted from the draw-bar and proceeded, without stopping or looking, to run across the northerly tracks at a rate so rapid, occasioned by the impetus of the car, that he could not stop, and was struck by a west-bound car, which, at the time he started across the tracks, was only 10 feet away from him, and was proceeding at 7 or 8 miles an hour. A Divisional Court set aside a judgment and verdict in his favour, holding that he was obviously guilty of contributory negligence, and that the accident happened so instantaneously that the motorman could not be expected, in the circumstances, to see the boy and apply the remedy. In view of the boy's evidence that, if the gong had been rung, he could not have heard it owing to the noise, it was held that it could not be maintained that a failure to ring it was the cause of the accident. The intelligence of the injured boy was held to exclude the application of the principle of Lynch v. Nurdin, 1 Q. B. 29.——The point decided by a Divisional Court in Simpson v. Toronto and York Radial R. W. Co., 10 O. W. R. 33, is that a passenger is not disentitled, by reason of contributory negligence, to recover for an injury caused through having any part of his body projected beyond the outside edge of the structure of the car in which he is being conveyed. The question is held to be for the jury.

Trade Name.]—An appeal by the plaintiffs in National Casket Co. v. Eckhardt from the judgment of MacMahon, J., 9 O. W. R. 313, noted ante 276, was dismissed by a Divisional Court: 10 O. W. R. 74.

Vendor and Purchaser.]—An appeal by the plaintiff in Bohan v. Galbraith from the order of a Divisional Court, 9 O. W. R. 95, 13 O. L. R. 301, noted ante 196, was dismissed by the Court of Appeal: 10 O. W. R. 143.

Will.]—A gift of all a testator's real and personal property to his wife for her sole use and benefit so long as she should remain the testator's widow, but with a provision that, in the event of her marrying again, it was the testator's will that a sister of his be paid from his estate $500, and a brother $500, is held by Falconbridge, C.J., in Re Morton, 10 O. W. R. 211, to give the widow an estate in fee subject to the payment mentioned.——It is decided by Meredith, C.J., in Re Moyer, 10 O. W. R. 3, that a bequest in the words, "I will, devise, and bequeath to my beloved wife, Catherine Moyer, all my personal property of every nature and kind soever, consisting of notes, bank accounts, lumber, wheat, and all other personal effects, to have and to hold the same to her own use and benefit forever," is not specific; but the contrary is decided with respect to the proceeds of the sale of a farm which was devised to a daughter of the testator, charged with certain payments to his executors, with a provision that in case the daughter did not accept such devise, the farm should be sold and the proceeds divided as the testator had directed with respect to the moneys charged thereon, and which was sold accordingly; this and the moneys payable by a son to whom a farm had been devised on similar terms, were held to constitute specific bequests. ——The point to be decided in Toronto General Trusts Corporation v. Hardy, 10 O. W. R. 43, was whether dividends upon certain shares held by the testator in companies carrying on a business essentially the same as his, were to be deemed to form part of the income from his business under

paragraph 20 of his will, or to form part of the income of his estate, within the meaning of paragraph 18 thereof. On the particular wording of these and other clauses of the will, Teetzel, J., held that these dividends came within the latter category.——The deceased having made a will on the 6th August, 1902, his sister, a woman strong in mind and body, importuned him for about an hour on the 9th of the same month, in an excited, "commanding," and "boisterous" manner, to make a certain change in it, expressing a determination to have the will changed, or she would destroy it. The deceased yielded and executed a second will. He was in a weak and dying condition, very much depressed, and, as his medical attendant said, would do anything for peace and quiet. As the solicitor said, "After she had worried and tormented him till he was tired out, he said 'Well make it to please her, Mr. O., I am sick, I am dying soon, and I must have peace'—words to that effect begging for quiet." A Divisional Court held that the importunity in question was such that the execution of the second will was not the act of the deceased or the free act of a capable testator, and that it was therefore invalid: Roman Catholic Episcopal Corporation v. O'Connor, 10 O. W. R. 76.——The will of Mary Bullen contained an express devise of certain land to her son, "for and during his life," and then continued, "and from and after the death of my said son . . . I give and devise . . . to the use of the children of the said W. B. lawfully begotten or to be begotten, and the heirs of the bodies of the said children of the said W. B. respectively." Riddell, J., held that neither the rule in Shelley's case nor the rule in Wild's case was applicable, and that W. B. took only an estate for life: Bullen v. Nesbitt, 10 O. W. R. 119.——Thompson v. Jose, 10 O. W. R. 173, turned upon the meaning to be given to the words "curtilage" and "outbuildings" in the will in question in connection with a devise of a house. The words being inapplicable to the house, and to the lawn and garden used therewith, Britton J., in the circumstances, held that they in-

cluded a triangular piece of land to the south of the residence on which was a barn and barnyard.——A power to executors to sell real estate if they should deem advisable, with the assent of the tenant for life, is held by Riddell, J., in Burrows v. Allen, 10 O. W. R. 179, not to carry with it a prohibition against selling to such tenant for life.

CASES FROM WESTERN CANADA.*

Contract.]—In Garson v. Watson (Man.), 5 W. L. R. 534, it was alleged by the defendant that certain cut stone supplied by the plaintiff for a building for which the defendant was the contractor, was not in accord with the specifications. In an action for the price, the evidence on this point was conflicting, but it appeared that the defendant had accepted the material, after it had been worked into proper form and condition, and placed it in position without objection until after the material had lost its character as chattels and had become part and parcel of the building. In an action for the price, Macdonald, J., held that the plaintiff was entitled to recover.——The question arose in Dixon v. Craig (Man.), 5 W. L. R. 549, as to the damages recoverable by the plaintiffs for alleged breaches of a contract by the defendant, who was proprietor of the electric lighting plant at Minnedosa, to pay for all wood bought for the use of the plant through the plaintiffs, storekeepers. It appeared that the defendant had been obliged to buy wood from others than farmers in large lots, and that the plaintiffs had refused to pay for such purchases, holding that under the contract they were only obliged to pay for wood purchased from the neighbouring farmers. Mathers, J., decided that the plaintiffs could not recover in respect of these lots, and that in a case where the vendor of the wood testified that direct payment made no difference, as he always dealt with the plaintiffs anyway, there was no damage sustained.

Costs.]—The costs of a commission to take evidence abroad were refused to a successful defendant in United States Savings and Loan Co. v. Rutledge (Y.T.), 5 W. L. R. 585, by Craig, J., in the exercise of the discretion conferred

*Short notes of the most important cases in Volume V. of the Western Law Reporter, Nos. 7 and 8, pp. 533 to 590, inclusive.

on him by Rule 525, the defendant having succeeded upon the defence of the Statute of Limitations, and the evidence taken upon the commission having been directed to other issues raised by the defendant, which he did not attempt to substantiate at the trial.

Fraud and Misrepresentation.]—It was contended by the defendant in Rosen v. Lindsay (Man.), 5 W. L. R. 546, an action for damages for fraud and misrepresentation in the sale of an hotel, that since the plaintiff had in 11 months made a profit of from $3,000 to $4,000 in running the hotel, and had sold it an advance of $3,000, besides, he had suffered no loss; but Mathers, J., in the absence of authority, held, applying the principle that he who makes a false representation intending another to act on it, is bound to make such representation good, that the plaintiff was entitled to recover such a sum as would place him in the position he would have been in had the representations been true.

Husband and Wife.]—Shortly, the point decided by Harvey, J., in Fraser v. Kirkpatrick (N.W.P.), 5 W. L. R. 581, is that the Ordinance removing the limitations upon the acquisition of separate property by a married woman does not extend the "earnings" of a married woman beyond the terms of s. 36 of the North-West Territories Act, so that only her earnings acquired in a business carried on by her "apart" from her husband become her separate property.

Liquor License Act.]—It is decided by Wilson, Co. C.J., in Re Ross and McCool (B.C.), 5 W. L. R. 561, that there is no appeal from the decision of a board of license commissioners refusing to rehear under s. 42 of the License Act, as amended by s. 3 of c. 26 of the Acts of 1906, a matter decided by them, the section in question vesting a discretion to grant a rehearing solely in the board itself.

Municipal Corporations.]—Clause 86 of c. 55 of the statutes of Alberta for 1906, empowering the city council to

pass by-laws for "fixing, altering, and regulating" from time to time the hours of opening and closing of retail stores, is decided by Harvey, J., in Re Brown and City of Calgary (N.W.P.), 5 W. L. R. 576, upon an application to quash a by-law of the city passed in pursuance of the clause mentioned, not to be ultra vires of the provincial legislature as affecting trade and commerce. It is also decided that the application of the by-law to holidays not fixed does not invalidate it, inasmuch as this application is limited to days proclaimed by proper authority. In re Cloutier, 11 Man. L. R. 220, distinguished on this point.

Practice.]—The point decided by Wetmore, J., in Dominion Bank v. Freedt (N.W.P.), 5 W. L. R. 589, is that a motion to dismiss an action for want of prosecution must be made upon notice of motion and not upon summons, and, that being the case, there is no jurisdiction to proceed by summons. The summons issued by the defendant was discharged, and discharged with costs because, although the error was not a grievous one, the defendant "was a little bit quick in making the application."

Promissory Note.]—An instrument in the form of a promissory note, but with a memorandum at the foot, as follows:—"Given for Suffolk stallion 'His Grace,' same to remain property of J. H. Truman until this note is paid," was held by Harvey, J., to be within the authorities under which such a promise to pay has been held not to be a negotiable promissory note so as to render the debt evidenced thereby assignable by indorsement: Frank v. Gazelle Live Stock Co. (N.W.P.), 5 W. L. R. 573.

Railway.]—An appeal from the judgment of a County Court was allowed by the full Court in McDaniel v. Canadian Pacific R. W. Co. (B.C.), 5 W. L. R. 564, Martin, J., dissenting, without deciding whether the words "or otherwise" in s.-s. 4 of s. 237 of the Railway Act mean "or otherwise at large" or "or otherwise upon the highway," or whether that sub-section applies to localities other than those where

there is the statutory obligation to fence, because, on the plaintiff's own evidence, he "exercised no kind of supervision over his horses and cattle," and, besides, his evidence precluded any chance of there having been a breach on the part of the defendants of any statutory obligation which resulted in the killing of the cattle sued for.——Also in Becker v. Canadian Pacific R. W. Co. (N.W.P.), 5 W. L. R. 569, where the plaintiff had put his horses in a pasture consisting of 2 sections of land indifferently fenced, and traversed by highways with "gates of a kind," which were opened by passers-by or those putting animals in or taking them out, and these horses escaped from the pasture and got upon the right of way of the defendants' railway, Harvey, J., decided that, in the circumstances, the going to the place once or twice a week would be valueless to keep the animals in charge, and could only be intended to prevent them going far astray. In fact it shewed that the plaintiff did not consider the animals securely confined, and, apart from the special duty to prevent them being at large under the first sub-section of s. 237 of the Railway Act, was a "wilful act" on his part through which they got at large.

Will.]—The will in question in Tellier v. Schilemans (Man.), 5 W. L. R. 536, by which the testator gave all his property to the defendant, who had been for some time his mistress, to the exclusion of his daughter, was set aside by Richards, J.A., because it did not appear that the testator had become estranged from his daughter, for whom he had a strong affection as alleged, and there was no other reason why he should, if he understood what he was doing, have excluded her from the will, and because, in addition to the fact that the medical evidence as to his condition was conflicting, it appeared by the evidence of a clergyman and others, to whom he had declared he had made provision for his daughter, that he did not know what he was doing.

DECISIONS FROM THE COURTS OF QUEBEC AND THE MARITIME PROVINCES.*

Animals.]—Apparently not much stress is laid upon *scienter*, though it is mentioned in the judgment of the majority of the Court delivered by Pagnuelo, J., in Martin v. Hogg (Que.), 3 E. L. R. 209, an action for damages for injuries caused to the plaintiff by the kick or jump of an ox belonging to the defendant. The plaintiff wished to purchase a cow, which was in the same stall with the ox, in a public market, and entered the stall to examine the cow, being accompanied by an agent of the defendant. The question of responsibility turned upon arts. 1053 and 1055 of the Civil Code. It was held that the proprietor of an animal cannot, in every case, be held responsible for the damage the animal may cause; he is not responsible when the injured party is hurt through his own fault. The proprietor of the animal, even if he himself knew its nature, would not have been bound to warn any one to take care. It was the act of an imprudent man to go into the stall as the plaintiff did; the injuries were the direct result of the plaintiff's own rashness. Mathieu, J., dissented.

Certiorari.]—Upon appeal from an order granting a writ of certiorari to remove an order made by a magistrate under the Seamen's Act, Marshall v. Schwartz (N.S.), 3 E. L. R. 227, it was held by the full Court that the intituling of the affidavits for use upon the motion for the certiorari in the cause as it was before the magistrate was irregular—the affidavits should be intituled in the Court and not in any cause; but the irregularity was cured by Rule 14 of the Crown Rules; and the Court might direct the memorandum spoken of in

* Short notes of the most important cases in Volume III. of the Eastern Law Reporter, Nos. 4 and 5, pp. 157 to 240, inclusive.

that Rule to be made on the affidavits. A further objection to the order for the certiorari was, however, found to be fatal. Rule 29 provides that "no notice of motion for a writ of certiorari shall be effectual, nor shall any writ be granted thereon, unless the recognizance and affidavits of justification shall have been filed as prescribed by the preceding section before the notice was given, and the same verified by affidavit." The English is not good, but it seems that the meaning is that the fact of the filing of the recognizance and affidavits is to be proved by affidavit. This not having been done, and the provision being regarded as mandatory, the appeal was allowed with costs.

Contempt of Court.]—One Sims was also a witness refusing to answer in the prosecution referred to in In re Hugh Morrison (P.E.I.), 3 E. L. R. 154, noted ante 460. At the hearing on the 28th February a warrant was issued for his committal for 8 days. For some unexplained reason, but not owing to any act or fault of the witness, he was not arrested until the 5th March, and was not brought before the magistrate on the 7th March, when the Court met. Fitzgerald, J., said (In re Hartel Sims (P.E.I.), 3 E. L. R. 157): "If I have read the statute (Criminal Code, s. 678) aright, the detention is intended to be for no longer a period than the time between the several adjournments, with a clear provision requiring the prisoner to be brought up upon each adjournment in order that he may have an opportunity of answering. The magistrate's action is only another mode of punishing for contempt by imprisonment for a specified period beyond the adjourned hearing, and is equally invalid. . . . He has no right to commit a witness for 8 days if the adjournment is for a shorter period of time, and if, through no fault of the witness, he is detained in prison beyond an adjournment, his detention is equally illegal." The witness was discharged from custody.

Fire.]—The principle of Fletcher v. Rylands, L. R. 3 H. L. 330, was, chiefly on the authority of Furlong v. Carroll,

7 A. R. 145, applied by the Supreme Court of Nova Scotia to a case where the defendant's wife in fumigating her hen-house, by means of inflammable matter in a pan, set the hen-house on fire, which was communicated by sparks to the plaintiff's barn 40 feet away: Creaser v. Creaser (N.S.), 3 E. L. R. 216. "It may not be unlawful," quoth Longley, J., delivering the judgment of the Court, "for the defendant to fumigate his hen-house, but if it be done in such a way as to set the barn on fire, and this results in the destruction of the plaintiff's property, may it not be said that the defendant 'brings upon his land something which would not come naturally upon it, and which is in itself dangerous and may become mischievous?'" It was also held that the statute 6 Anne c. 58, though in force in Nova Scotia, does not apply where the fire originated in the use of a dangerous instrument knowingly used by the owner of the land in which the fire broke out.

Husband and Wife.]—In Cormier v. Arsineau. (N.B.), 3 E. L. R. 203, the plaintiff was a married woman living with her husband, who made a mortgage on his farm for $200, and, in accordance with a prior agreement with her, gave her $100 as consideration for her joining in the mortgage to bar her dower. With her $100 the plaintiff bought a horse, which was seized under the defendant's execution against the plaintiff's husband. In an action for trespass and conversion a verdict for the plaintiff was affirmed by the full Court, holding that the money was not received by the wife from her husband during coverture within the meaning of the qualifying part of s.-s. 2 of s. 4 of the Married Women's Property Act, C. S. N. B. 1903 c. 78.

Principal and Agent.]—An interesting point as to agent's commission is decided by Russell, J., in Austen Bros. v. Canadian Fire Engine Co. (N.S.), 3 E. L. R. 222. The plaintiffs were the exclusive agents for the sale of the defendant's engines in a certain district, and were entitled to be paid "5 per cent. on all sales effected" by the defendants in

that district. An agreement was made, through the procurement of the plaintiffs, between the defendants and a city corporation, under which the defendants were to deliver to the corporation an engine which should comply with certain tests set out in the agreement—"if the engine fails to comply with the said tests to the satisfaction of the persons appointed by the city to superintend the same, this contract is to be at an end." The engine delivered by the company did not comply with the tests to the satisfaction of the persons specified. Russell, J., after referring to Lockwood v. Levick, 8 C. B. N. S. 603, and Fisher v. Drewett, 39 L. T. N S. 254: "Looking at the nature of the business, I think it must be assumed that there would be a variety of stipulations and conditions in the agreement for sale between the parties brought together by the agents, and I incline to the view that when a reasonable contract was concluded between the intending buyers and sellers, the commission agents had done all that they bargained to do, and were entitled to their commission. . . . It would be, I think, a too strict construction of the agreement . . . to hold that no commission was earned, although a contract for sale satisfactory to the defendants was procured through the agency of the plaintiffs, simply because the defendants had failed to perform the conditions that would entitle them to the price of the article agreed to be sold."

Quantum Meruit.]—In re Ansley, Ex p. Chesley (N.S.), 3 E. L. R. 234, is of the class of cases typified by McGugan v. Smith, 21 S. C. R. 264. The principal item of the claim of C. against the estate of A. was for services as a housekeeper and looking after the affairs of A. for 68 weeks, including attendance as a nurse during the last illness of A. and her daughter. The claimant was a sister-in-law of the deceased, but not a member of her household previous to the time of her being sent for by the deceased to take care of her and her daughter. It was held by the full Court that there having been a request and a performance of services,

the claimant was entitled to recover on a quantum meruit, and this notwithstanding the circumstance that she expected and received a legacy, the evidence not shewing that she performed the services *because* she expected the legacy. In fact she expected that A. would leave her her whole estate by her will, instead of which she was given a problematical residuary interest. The claimant said: "I have not kept an account of services rendered or of money paid out, but trust to my memory therefor. I just made out my account against Mrs. A. when I found out she had not left me anything in her will." This evidence perhaps may be thought to indicate that the services were rendered in expectation of a legacy, but the Court held otherwise. Osborne v. Guy's Hospital, 2 Str. 728, and Baxter v. Gray, 3 M. & G. 771, are referred to as well as Smith v. McGugan.

Ship.]—Nearly 22 pages of the Eastern Law Reporter are devoted to the judgment of Sullivan, C.J., in Magdalen Islands S. S. Co. v. The "Diana" (P.E.I.), 3 E. L. R. 158, a case of collision between the steamship "Amelia" and the fishing vessel "Diana" in the Gulf of St Lawrence. The conclusion, after an exhaustive examination of the evidence, is that the "Amelia" was alone to blame for the collision. No salvage remuneration was allowed, the rule that the wrongdoer cannot recover for services rendered to the ship with which he has been in collision being applied.

Water and Watercourses.]—The British American Land Company, having been for upwards of 50 years the owners of lots bordering on Little Lake Magog and the river Magog, 24 years ago built a dam across the river, and since that date have been in public and uninterrupted possession thereof, and have controlled the water power. The government of the province of Quebec, after having made an examination into original concessions, contracts of the British American Land Company with other industrial companies in Sherbrooke, and also into the navigability and floatability of the river, issued letters patent in favour of two of the aldermen

of Sherbrooke, in trust for the city corporation, granting unto them, for the price of $2,000, the bed of the river for a length of 3 miles. The land company obtained permission from the Attorney-General and instituted proceedings by way of scire facias to repeal the letters patent issued to the two aldermen: Attorney-General v. McManamy (Que.), 3 E. L. R. 179. The following points are decided by the judgment of the Superior Court in review delivered by Demers, J.: (1) That scire facias lay at the instance of the land company invoking error and setting up anterior letters patent. (2) That if the land company could establish their case, the letters patent issued to the defendants should be set aside without the plaintiff being obliged to tender back the $2,000 paid by the defendants. (3) That the land company were not by virtue of their riparian ownership owners also of the bed of the river. (4) That the river Magog is a floatable stream. And judgment was given for the defendants.

EDITORIAL REVIEW.

The New Knights.

Among birthday honours bestowed by the King last month, that of Knighthood was conferred upon the Chief Justice of Canada and the Lieutenant-Governor of Ontario, who will henceforth be known as Sir Charles Fitzpatrick and Sir William Mortimer Clark.

Rules of the Supreme Court of Canada, 1907.

A new set of Rules was made by the Judges of the Supreme Court of Canada on the 19th June. Rule 12 is new in part, and attention is drawn to it especially, because the form in which cases are to be printed for the Supreme Court should be followed in printing for the Ontario Court of Appeal and other provincial appellate Courts, if it is desired to use the same appeal books in the higher Court.

Rule 12. The case shall be in demy quarto form. It shall be printed on paper of good quality, and on one side of the paper only with the printed pages to the left, and the type shall be pica, and the size of the case shall be eleven inches by eight and one-half inches, and every tenth line shall be numbered in the margin. Where evidence is printed there shall be a head-line on each page giving name of witness, and shewing whether the evidence is examination-in-chief, cross-examination, or as the case may be. All exhibits shall be grouped together and printed in chronological order. All pleadings, judgments, and other documents, shall be printed full unless dispensed with by the Registrar. The title page shall contain the name of the Court and province from which the appeal comes, and the style of the cause, putting the appellant's name first, as follows:

A. B.
(Plaintiff or defendant, as the case may be),
Appellant.
and
C. D.
(Defendant or plaintiff, as the case may be),
Respondent.

The names of solicitors and agents may also be added.

There shall be an index at the beginning of the case, which shall set out in detail, the entire contents of the case in four parts as follows:

Part I. Each pleading, rule, order, entry, or other document with its date, in chronological order.

Part II. Each witness by name, stating whether for plaintiff or defendant, examination-in chief or cross-examination, or as the case may be, giving the page.

Part III. Each exhibit with its description, date, and number, in the order in which they were filed.

Part IV. All judgments in the Courts below, with the reasons for judgment, and the name of the Judge delivering the same.

2. If the appellant desires, the case may be printed according to the regulations as to form and type in appeals to His Majesty in Council.

Unique Legislation.

In the Statute Law Amendment Act passed by the Ontario legislature at the last session, s. 41 is a noteworthy section. It in effect re-enacts that provision of the Imperial statute 14 Geo. III. c. 78, s. 86, which exonerated any person in whose house a fire accidentally starts, from liability for damages suffered by their neighbours in consequence thereof. The 14 Geo. III. c. 78 contained other provisions respecting the application of

insurance moneys payable to mortgagors. The Act has been held to be in force in Ontario: see Gaston v. Wald, 19 U. C. R. 586; Stinson v. Pennock, 14 Gr. 604; and Carr v. Fire Assurance Association, 14 O. R. 487; but new provisions having been introduced in Ontario as to the application of insurance moneys payable to a mortgagor, now embodied in R. S. O. c. 121, s. 4, the 14 Geo. III. c. 78 was wholly repealed by 50 V. c. 26, s. 154; and, as if one repeal was not enough, it was again repealed by 65 V. c. 17, s. 18. The re-enactment effected by s. 41 has a retroactive effect and is declared to have been in force since the 1st July, 1867! We have thus a statute twice repealed by the legislature of Ontario, now declared to have been in force notwithstanding such repeal. This certainly is unique in the history of legislation.

On a Photograph Group of the Osgoode Hall Law School Graduating Class of 1907.

(With apologies to the shade of Robbie Burns.)

The following was picked up near a well known photographer's studio in the city, and is published "without prejudice" to "all concerned."

Here's a fresh group of legal "lichts"
Who'll twist the truth wi' a' their michts,
Mak basswood law seem awfu' bright
Wi' learned lore:
Prove white is black, and black is white,
Through cluds o'stoure!

They a' look meek and unco good;
Let's hope their mugs are no a hood
For brains and tongues to furnish food
For legal quibble:
Faith if they are I fear the brood
Gangs to the deevil!

But 'mang the lot there is a chiel;
He is a'richt, I ken him weel;
He wadna cheat nor lie nor steal—
It's Jamie S——on!
He'll aye tell truth an' mak you feel
That ye can trust him.

As to the rest I 'wadna wrang
The "Deil's Own" wi' my simple sang;
May a' their lives be guid and lang
As weel as S——on's!
So a' their titles may be strang
To just redemption!

Let's hope they'll no' too greedy be,
And aye charge nane but modest fee,
Nor snatch the client's last bawbee
Wi' greedy clitch,
And mak the poor deils wish to see
Them scarred wi' itch! !

June, 1907. J. D.

Expert Evidence.

The distrust in the evidence of experts in handwriting which has long been felt and expressed in legal circles, has found significant expression in the Imperial House of Commons as reflecting the sentiments of the people in the following question addressed by Mr. Harwood Bonner to the Home Secretary, who replied that as the answer to the first part of the question was in the affirmative the second part did not arise. Mr. Harwood Bonner asked Mr. Gladstone whether any other expert, besides Mr. Gurrin, has at any time given an opinion, at the request of the Home Office, upon the authorship of the disputed letters in the Edalji case, or has been consulted as to their authorship; and whether, if not, he will order the same to be submitted to a selected committee of experts for decision. In relation to

the evidence of experts an anecdote of the late Mr. Serjeant Armstrong, who for a generation was the leading advocate at the Irish Bar, is still after thirty years worthy of record. He was engaged in a case in which the signature of one of the parties to a deed was in dispute. An expert had given his evidence in chief as to the genuineness or otherwise of the signature as to which he was positive. Serjeant Armstrong thus commenced his cross-examination: "What about that dog?" The Court was aghast, thinking that the serjeant, who had suffered from a temporary mental aberration, had a lapse into insanity. The witness looked perplexed and maintained silence. The question was repeated two or three times with increasing loudness of tone. At last the witness said: "I do not understand you, nor do I know to what you allude." "You swear that," said the serjeant. "Yes," was the reply. "Then," said the adroit cross-examiner, "what about the dog that Mr. Baron Down told the jury he would be very sorry to hang on your evidence?"

A Seasonable Definition.

A "grass lawyer" is one whose stenographer is away on her holidays.

Recent American Decisions.

Carriers.—The right of a conductor to eject a passenger from a car when the station to which his ticket reads is passed, and he refuses to pay additional fare, is sustained in Virginia & S. W. R. Co. v. Hill (Va.), 6 L. R. A. (N.S.) 899, notwithstanding his contract calls for a ticket to a more distant point, and the ticket held by him was issued by mistake.

A passenger who, while travelling on a rapidly moving railway car, intentionally and needlessly projects his arm, or a part thereof, out of the window of the car, is held, in Interurban R. & T. Co. v. Hancock (Ohio), 6 L. R. A. (N.S.) 997, to be guilty of negligence, as matter of law.

One who, by fraudulent representations as to her age and occupation, procures a student's reduced-fare railway ticket, is held, in Fitzmaurice v. New York, N. H. & H. R. Co. (Mass.), 6 L. R. A. (N.S.) 1146, not to occupy, while travelling upon it, the relation of passenger towards the carrier, but to be a trespasser, and to have no right to recover for injuries received while upon the train, unless they were received under circumstances which would entitle a trespasser to recover.

Damages.—Parents of an infant child are held, in Long v. Chicago, R. I. & P. R. Co. (Okla.), 6 L. R. A. (N.S.) 883, not to be entitled to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant.

Drunkard.—A person who has the fixed habit of frequently getting drunk is held, in Page v. Page (Wash.), 6 L. R. A. (N.S.) 914, to be an habitual drunkard within the meaning of the divorce laws, although he has more sober than drunken hours, and the habit does not incapacitate him from performing, during the working hours of the day, ordinary, unskilled, manual labour.

Homicide.—Where two, in furtherance of a common design, enter upon the perpetration of a burglary, armed and prepared to kill if opposed, and, while so engaged, are discovered, and, in the effort to escape, one of the burglars kills one who is trying to arrest him, it is held, in Conrad v. State (Ohio), 6 L. R. A. (N.S.) 1154, that both burglars are equally guilty of the homicide, although one of them was not armed with a deadly weapon, and although such killing was not part of the pre-arranged plan.

Insurance.—A provision that, after payment of a certain number of premiums, an insurance policy shall become incontestable, is held, in Thompson v. Fidelity Mut. L. Ins. Co. (Tenn.), 6 L. R. A. (N.S.) 1039, not to apply to contests for failure to pay premiums.

A provision in an insurance policy that, if the policy shall have been in continuous force for three years, it shall thereafter be incontestable, is held, in Mutual Reserve Fund L. Asso. v. Austin (C. C. A., 1st C.), 6 L. R. A. (N.S.) 1064, not to be inapplicable to a policy delivered when the insured was not in good health, on the theory that, because the policy provided that it shall not take effect until delivered while the insured was in good health, it never was in force.

Street Railways.—When dogs are engaged in fighting upon street railway tracks, and are apparently oblivious to an approaching car, the motorman, upon discovering them in a position of peril, is held, in Harper v. St. Paul City R. Co. (Minn.), 6 L. R. A. (N.S.) 911, to be required to exercise reasonable care, by using proper signals or checking the speed of his car, to avoid their injury.

Will.—Revocation of a will is held, in Strong's Appeal (Conn.), 6 L. R. A. (N.S.) 1107, not to be effected by tearing it and writing upon it, "Superseded by the written one," where the written one is ineffectual because not properly executed, and it is plain that the revocation proceeded upon the assumption that the written one was valid.

PERIODICALS AND PAMPHLETS.

The Labour Gazette (Dominion of Canada, Department of Labour, June, 1907): "Industrial and Labour Conditions during May;" "Quebec Legislation affecting Labour, 1907;" "The Industrial Disputes Investigation Act, 1907—Proceedings under the Act during the Month of May;" "The Manufacturing Industry in Canada—Value of Manufactured Products, 1901-06;" "Statistics and other Returns during May;" "Directory of Labour Organizations."

Case and Comment (Rochester, N.Y., June, 1907):—"The Kansas-Colorado Case;" "Suit by State against Outside Nuisance;" "Federal Eight-Hour Law;" "Liquors not Ordered Shipped C. O. D.;" "Novel Patent Question;" "Two Cents a Mile;" "Compelling Railroads to Make Connections;" "Prohibiting Defence of Suicide against Policies of Insurance;" "New Action in State Court after Dismissal of Suit Removed."

The Green Bag (Boston, June, July, 1907):—"Samuel Nelson," by Edwin Countryman; "The Origin of the System of Recording Deeds in America," by Joseph H. Beale jun.; "Has Trial by Jury in Civil Actions been Abolished?" by William Hamilton Cowles; "Ancient Mortmain and Modern Monopoly," by Richard Selden Harvey; "The Abolition of Capital Punishment," by James H. Vahey; "Thomas F. Marshall," by Charles Fennell; "The Equitable Life Assurance Society, A Possible Remedy to Cancel the Stock Control," by Robert Rentoul Reed; "Pleading," by J. J. Godfrey; "The Protection of Unused Patents," by Paule Bakewell; "The Public Service Commissions Act," by Travis H. Whitney.

Federal Reporter (National Reporter System, 13th, 20th, 27th June, 4th, 11th July, 1907.)

Law Notes (Northport, N.Y., July, 1907.)

Central Law Journal (St. Louis, Mo., 14th June, 12th July, 1907.)

Chicago Legal News (15th, 22nd June, 1907.)

Law Student's Helper (Detroit, Mich., June, 1907.)

Kathiawar Law Reports (Limbdi, April, 1907.)

Calcutta Weekly Notes (20th, 27th May, 3rd June, 1907.)

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THE
CANADIAN LAW TIMES.

AUGUST, 1907.

THE TORONTO STREET RAILWAY CASES.

THE full text of the judgment of the Judicial Committee of the Privy Council in these cases has now arrived, and, as we anticipated, the reasons given for the decision are in the main so conclusive that they must inevitably commend themselves to the common sense of any ordinary business man.

No great question of law is involved in the cases, and but for the clamour raised by certain Toronto newspapers over the result, it would not be necessary again to refer to the subject.

The cases turned simply on the construction to be placed on a written instrument.

As is well known, the city of Toronto, being owners of a street railway worked by horses, in the year 1891 offered the railway and plant for sale, including the exclusive privilege of operating a surface railway in the city of Toronto. The sale was to be subject to numerous conditions; and when the magnitude of the undertaking and the various difficult and intricate details are considered, it is not very surprising to find that some of the conditions have been found to be susceptible of difference of opinion as to their proper meaning.

The sale was effected, and the present proprietors, as assignees of the original purchasers, have acquired their rights, subject to the conditions of the original sale by the city.

These conditions are set out in detail in a schedule to the Toronto Railway Company's Act of incorporation, 55 V. c. 99 (O.)

As we have said, the railway when sold was a horse-car system, but very shortly after its purchase by the present proprietors it was converted at great expense into an electric system. And we take it that this change has, to some extent, created, or, at all events, accentuated, the differences of opinion which have arisen touching the meaning of some of the conditions. It was no part of the bargain, nor, so far as the Act we have referred to shews, within the contemplation of either party, that the railway should be worked otherwise than it had been previously worked, namely, by horse power.

It would, of course, be generally conceded that the Toronto Railway Company became the purchasers of the plant and franchise not as a philanthropic undertaking to be exercised solely for the benefit of the citizens of Toronto, and with an exclusive regard to their convenience; on the contrary, it must be admitted that their purpose and object was mainly to carry on the business in a way that would be profitable for themselves, and, incidentally, a source of convenience and advantage to the public.

The franchise was, no doubt, a valuable one, but to make it available as a source of profit, required the expenditure of an exceedingly large amount of money. Electricity as a means of supplying motive power was then in its infancy, and the company in undertaking to convert the railway into an electrical system were assuming all the risks incident to novel enterprises.

The conditions of sale, as we have said, were drawn with regard to a railway operated by horse power, and those conditions have now to be construed in reference to a railway operated by electricity.

One of the questions raised by the recent appeal was in reference to the application of the agreement to streets within new territorial additions to the city. In other words,

was the agreement to be construed as applying only to streets within the territorial limits of the city as they existed at the time of the agreement, or did it apply to streets in districts from time to time added to the city? The Supreme Court of Canada decided by a majority of three to one that the agreement only applied to streets within the city limits as they existed when the agreement was made, and the Judicial Committee affirmed that decision on the grounds given by the majority of the Judges of the Supreme Court, and say:—

"The injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is 5 cents, seems to their Lordships insuperable."

Perhaps this reason is not quite so cogent as, as first sight, it may appear, because we shall see presently that in their Lordships' opinion the corporation have really no power to compel the railway company to lay down tracks which they do not see fit to.

The next condition dealt with is condition 14. This condition is as follows:—

"14. The purchaser will be required to establish and lay down new lines, and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council, within such period as may be fixed by by-law to be passed by a vote of two-thirds of the members of said council, and all such extensions and new lines shall be regulated by the same terms and conditions as relate to the existing system, and the right to operate the same shall terminate at the expiration of the term of this contract."

It was contended on behalf of the city that this gave the city an absolute right to require new lines to be laid, and to recover damages for breach.

But another condition expressly provided for the event of default, and it was this:—

"17. In case the purchaser fails to establish and lay down any new line as aforesaid, and to open the same for traffic, or to extend the tracks and services on any street or streets within such period as may be fixed by by-laws of the city council, to be passed as herein provided, the privilege of laying down such new lines or extensions on the street, or portion of street, so abandoned by the purchaser, may be granted by the said council to any other person or company, and the purchaser shall in such case have no claim against the city for compensation."

The Judicial Committee say that these clauses must be so construed as to harmonize with the general provisions of the bargain.

"To hold that the 14th clause enables the corporation to compel the company to incur the expense of making a railway in streets where, in the view of the latter, it cannot be worked at a profit, or beneficially introduced into their system, would be to adopt an interpretation out of harmony with the unambiguous provisions of other clauses, and their Lordships ought not to do so unless the wording is so plain as to have no alternative." They, therefore, adopt the conclusion of Sedgewick, J., in the Supreme Court, and hold that the parties had, by the express provisions of condition 17, laid down what was to be the consequence of a non-compliance on the part of the railway company with clause 14, viz., a loss of their exclusive privilege over the streets which they thus abandoned, and the devolution on the city of a power to give rights thereover to other persons or companies.

This reasoning seems to be entirely consonant with the principles on which statutes and contracts are ordinarily construed—viz., that where a statute or contract expressly provides a remedy for a breach of its provisions, that remedy is to be treated as displacing every other, including a remedy on a general covenant for the performance of the agreement.

The remaining point in controversy arose on the 26th condition, which was as follows:—

"26. The speed and service necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council."

Under this clause, it was contended that the city had power to regulate, through their engineer, the routes to be followed and the places at which stops were to be made. Now, any one reading the condition in question can see that what the city attempted to do was to read into the condition in question, by implication, something which it certainly does not explicitly contain; neither the route, nor the stopping of the cars, is mentioned; but it was argued that the word "service" was sufficient to cover what was claimed. Having regard to the fact that the system in use was, at the time of the agreement, a horse-car system, it is extremely improbable that the question of stops was regarded as of any moment, and that the only provision considered necessary on that head was that contained in condition 39, under the heading of "Stopping of Cars," viz.:—

"39. Cars shall only be stopped clear of cross streets, and midway between streets where distance exceeds 600 feet. Cars to have right of way, and vehicles and persons not to obstruct or delay their operation."

At all events, this was the only express provision regarding stops—and it seems not at all improbable that, in view of the system then in operation, it was really the only stipulation that was regarded as necessary on that head. With the alteration of the system to the more rapid mode of transit now in force, the question of stops acquired an altogether new importance, and the attempt to construe the 26th condition as giving the city engineer jurisdiction over that subject, though ingenious, was one that we need hardly be surprised to find has failed. The point was, no doubt, a debatable matter, and Osler, J.A., in the Court of Appeal, came to the conclusion that the word "service" was sufficient to cover what was claimed by the city.

But their Lordships of the Judicial Committee hold that the exclusive right of "operating" the railway which was conferred on the railway company "most certainly embraced the right to determine the routes of the different cars, and their inter-relations." "This," they say, "seems to be at the root of successful management of the enterprise, and ought to be in the hands of those who are responsible for getting the best monetary return out of it;" and they think that condition 26 did not deprive them of that prima facie right. That clause, by its collocation, they hold is not addressed to "routes" at all, in the sense in which that word is involved in the present controversy, viz., the course which each car is to take from the start to the end of its journey. And with regard to the stopping of cars, they hold that condition 39 of the agreement, which expressly dealt with that subject, negatived any other implied power in the engineer.

We have dealt thus at length with this case, not because of its importance from a purely legal standpoint, but to shew the utter baselessness of all the adverse newspaper comments upon the decision.

If there is one thing these cases have demonstrated, it is this, viz., the great importance from the standpoint of justice of the right of appeal to His Majesty in His Privy Council.

RECENT CASES FROM THE TIMES LAW REPORTS.*

Accident Insurance.]—A corporation employing a large number of workmen applied for insurance in the defendant company against their liability under the Workmen's Compensation Act. An interim receipt was issued on the 28th December, 1904, to cover the risk till issue of the policy. An accident happened on the 2nd January, 1905, by which a workman was injured. On the 3rd January the policy was executed and on the 9th January it was delivered to the corporation. It contained clauses requiring the employer to give immediate notice of any injury to a workman, and declaring such notice to be of the essence of the contract. No notice of the accident was given till the 14th March, and on the 15th March the injured workman died. On appeal from an award made under the provisions of the policy, Mr. Justice Bray held the corporation entitled to recover against the insurance company for the compensation properly paid to the widow of the workman, and this judgment is now upheld by the Court of Appeal (Fletcher Moulton, L.J., dissenting), on the ground that, as the insurance company had failed to shew that the corporation knew at the time of the accident of the condition requiring "immediate notice," the corporation could not be held to be bound by it: Re Coleman's Depositories Limited and Life and Health Association, 23 T. L. R. 638.

Banking.]—The drawer of a cheque countermanded payment by a telegram which was put into the bank's letter-box after banking hours and was overlooked next day, with the result that the cheque was paid. A County Court Judge held the bank liable to the drawer for the amount. On appeal, a Divisional Court of the King's Bench Division

* Including cases in Vol. 23, Nos. 26, 27, 28, and 29, to week ending July 2, 1907.

(Darling and A. T. Lawrence, JJ.), differed in opinion, Darling, J., holding that the bank were bound from the time of delivery of the telegram, and Lawrence, J., that the bank were not bound till the countermand came actually to the notice of its officers: Courtice v. London, etc., Bank, 23 T. L. R. 594.

Bill of Exchange.]—In Smith v. Prosser, 23 T. L. R. 597, the defendant, who was about to leave South Africa, signed and left with one Telfer two unstamped forms of promissory notes, the names of the payees, amounts, and time and place of payment, being left blank. Telfer's instructions were to hold these notes, and, in the event of Prosser having to make certain payments later on, to fill them up, and deliver them in accordance with directions to be given by Prosser. Telfer, without instructions of any kind, filled them up, stamped them, negotiated them, and misappropriated the proceeds. The plaintiff, a bona fide holder for value without notice of the fraud, brought this action against Prosser. The trial Judge gave judgment for the defendant, and is now upheld by the Court of Appeal, on the ground that the blank notes were not handed by Prosser to Telfer for the purpose of being negotiated, but merely for custody, pending instructions. The defendant was, therefore, not estopped from denying liability.

Carriers.]—Under the English Carriers Act, 1830, a railway company were held entitled to the benefit of the Act in respect of personal luggage, exceeding £10 in value, carried free with passengers on the company's railway. The goods were lost on the journey, and the company were not held liable, as the value and nature had not been declared nor any charge paid in accordance with s. 1 of the Act: Caswell v. Cheshire Lines Committee, 23 T. L. R. 580.

Contract.]—The unsuccessful defendant in a breach of promise action, smarting under the unjust treatment he claimed to have received, prepared a pamphlet in which he reflected

severely on the character of the lady who had recovered damages against him, and paid £50 to a firm of printers to print it, agreeing to indemnify them from damages. After the type had been set, the printing firm refused to proceed, having been advised that the pamphlet was libellous. In an action for return of the £50, they were held not liable to repay it, the contract being illegal; but held, also, that they could not recover on their counterclaim for the cost of the printing already done, as it was shewn that their agent had known the libellous character of the publication: Apthorp v. Neville & Co., 23 T. L. R. 575.——A novel point of law, raised upon the pleadings, was dealt with by Channell, J., in Wilson v. Carnley, 23 T. L. R. 578. The plaintiff alleged a promise by the defendant to marry her on the death of his wife, who was then living, that the defendant's wife subsequently died, and the defendant refused to marry her. It was pleaded that the alleged promise was contrary to public policy and was illegal and void. Mr. Justice Channell thought it impossible to lay down the abstract proposition that such a promise was necessarily void as being contrary to public policy, and decided that the action must go to trial.

Damages.]—In Mersey Docks and Harbour Board v. The "Marpessa," 23 T. L. R. 572, a case of collision between a ship belonging to the defendants and a dredger owned by the plaintiffs, caused by the fault of the ship, the question was upon what principle damages should be assessed, regard being had to the circumstance that the plaintiffs were precluded from making a profit out of their dredger. No other dredger having been hired, it was held that the cost to the plaintiffs of maintaining and working the dredger while it was working, including an allowance for depreciation, was a proper measure of damages, as representing the value of the dredger's services to the plaintiffs.

Discovery.]—In a libel action the defendants administered an interrogatory requiring the plaintiff to state whether he intended to set up express malice, and if so, on what facts

he relied to establish it. Held, improper; a litigant could not be required to pledge his oath to what he would do at the trial. Cooper v. Blackmore, 2 T. L. R. 746, discussed and not followed: Lever Bros. v. Associated Newspapers, 23 T. L. R. 652.

Divorce.]—A curious result was arrived at in Taylor v. Taylor, 23 T. L. R. 566, a wife's petition for divorce on the grounds of adultery and desertion. Prior to the petition being filed, the wife had applied to justices for an order for payment to her of an allowance, and, by an omission to strike out part of the printed statutory form, the order was made for separation and the payment of an allowance. Although of opinion that the case was one of great hardship, Mr. Justice Bucknill thought the petition for divorce must be dismissed, as payments were made by the husband, the desertion had been put an end to by the order for separation, and the wife's door had been shut against her husband even if he had desired to return.

Fraud of Trustee.]—A trustee to sell lands and distribute the proceeds had given promissory notes for a personal debt. He afterwards agreed with his creditor to secure these notes on a part of the trust estate. The creditor, with full knowledge of the breach of trust, took a conveyance of the lands, which recited a consideration of £2,000, and contained the usual receipt for the supposed purchase money. He then deposited this conveyance, by way of equitable mortgage, with one Bellis, who advanced £1,000 upon it, in good faith and with no notice, actual or constructive, of the fraud. Held, by the trial Judge, Parker, J., that as between the two innocent parties, Bellis and the beneficiaries of the trust, the equities were equal, and that the equity of the beneficiaries being prior in time must prevail. Lloyd's Bank v. Bullock, [1896] 2 Ch. 172, distinguished on the ground that in the present case there was no actual contract of sale by the trustee: Capell v. Winter, 23 T. L. R. 618.

Injunction.]—Riley v. Mayor of Halifax, 23 T. L. R. 613, illustrates the principle that in a trespass action where the injury sustained can be compensated by a small money payment, and to grant an injunction would be oppressive to the defendant, damages will be awarded and an injunction refused. The defendants were constructing a reservoir pursuant to statutory powers, and in doing so found it necessary to excavate upon the plaintiffs' lands, but without disturbing the surface, and to fill in the excavation with concrete. The plaintiffs claimed an order for the removal of the concrete and for the restoration of the land to its former condition. It was shewn that this would cost probably £1,000, while the actual damage was merely nominal, and the removal would really benefit no one. Following Shelfer v. London Electric Lighting Co., [1895] 1 Ch. 322, and exercising his discretion in accordance with the rule there stated, Joyce, J., refused an injunction and awarded £100 damages without costs, that amount having been offered by the defendants in settlement.

Master and Servant.]—Under the Workmen's Compensation Act, 1897, when the payment of the weekly compensation fixed has been terminated by order of a County Court Judge, upon application of the employer, the Court has thereafter no jurisdiction to review and increase the payments: Nicholson v. Pipe, 23 T. L. R. 620.——Upon the construction of the English Workmen's Compensation Act, 1897, the Court of Appeal held in Williams v. Ocean Coal Co. (Limited), 23 T. L. R. 584, that the fact of a wife having been deserted by her husband, or the fact that the husband was not contributing to his wife's maintenance at the time of his death, is insufficient to rebut the presumption that she is dependent upon him.——Two important points under the Workmen's Compensation Act, 1897, are discussed in Williams v. Vauxhall Colliery Co., 23 T. L. R. 591: first, whether an employee, by going back to work after an injury for which he is entitled to claim compensation and in respect of which a weekly allowance has been paid him during in-

capacity, thereby waives his rights under the Act against the employer; and, second, whether, if this be a waiver as against him, it is equally so against his dependents. Both points are decided against the employer.

Mortgage.]—An interesting case as to the results of the relationship of solicitor and client is Powell v. Browne, 23 T. L. R. 604. A solicitor induced his client to execute a mortgage to him for £2,500, by representing that the money would be advanced by him to another client, whom he named, at a higher rate of interest, the first client to get the benefit of the difference in the two rates. No money passed, but the mortgage contained a recital of payment and a receipt. The solicitor then made a sub-mortgage of the mortgage, and on this and another security obtained £1,200 from the defendant. In an action by the mortgagor against the sub-mortgagee to declare the mortgage void, held, that the sub-mortgagee took subject to all the equities affecting the security; he was bound to inquire from the original debtor as to the state of the account, and having had notice that the relationship of solicitor and client existed between the original mortgagee and mortgagor, he could not rely upon any recital and receipt in the mortgage. Declaration accordingly avoiding the security.

Negligence.]—A case closely resembling Simon v. London, etc., Omnibus Co., 23 T. L. R. 463 (noted ante p. 434) is Hase v. London General Omnibus Co., 23 T. L. R. 616. An omnibus was being driven along an unusual route, its usual route being closed. In turning a corner, close to the kerb, the top of the omnibus projected over the foot-pavement owing to the slope of the roadway, and the plaintiff, who was a passenger on top of the omnibus, was struck in the chest by the arm of a street lamp which stood on the foot pavement The blow was so severe that it broke two of the plaintiff's ribs and also broke the back of the seat on which he was sitting. The County Court Judge thought that the driver had a right to assume that he might safely drive on any part of the road-

way and also thought he was not guilty of negligence in not seeing the lamp post. The Divisional Court treated this as a finding of fact by the County Court Judge that there had been no negligence, and, as there was some evidence to support such a finding, declined to interfere with his judgment dismissing the action.

Practice.]—In Lloyd v. Great Western and Metropolitan Dairies (Limited), 23 T. L. R. 570, other causes of action were joined with a claim for recovery of land, without leave having been obtained and contrary to English Order 18, rule 2. The defendants having taken a step in the cause after knowledge of the fact, it was held that the omission to obtain leave was an irregularity which could be waived, and to which English Order 70, rule 2 (Ontario Rule 311) applied.

Principal and Agent.]—An agent for sale of certain shops found a purchaser who at first offered £4,000 for them, which was refused by the principal, who offered, however, to accept £4,500 clear of agent's commission. The agent and the purchaser were aware that part of the property was required by a municipal corporation for municipal purposes, but this fact was not made known to the principal. Upon a municipal committee reporting in favour of a purchase of this portion at £600, the purchaser wrote to the agent offering £4,600 for the whole, stipulating that the purchaser's share of the agent's commission on the sub-sale to the corporation should not exceed £15. The agent thereupon wrote his principal stating that he had succeeded in getting the offer increased to £4,600, that his fees were £117, but he would reduce them to £100, to bring the offer within the terms of his principal's former proposal. The transaction was completed on this basis, and the principal received the £4,600. Later the purchaser sold to the corporation the portion of the land required, for £650. In an action by the agent against his principal for commission, held, that he could not recover (1) because of his concealment of a material fact, and (2)

beause of his making a secret profit in the commission on the sub-sale: Price v. Metropolitan, etc., Co., 23 T. L. R. 630.

"**Professional Misconduct.**"]—The judgment of Warrington, J., in Hill v. Clifford, 23 T. L. R. 274 (noted ante p. 182), holding the plaintiff, a dentist, not guilty of professional misconduct within the meaning of his partnership articles, though his name had been removed from the Dentists' Register by the General Medical Counsel, for conduct "infamous or disgraceful in a professional respect," has been reversed by the Court of Appeal: 23 T. L. R. 601.

Restraint of Trade.]—The reversal by the Court of Appeal (23 T. L. R. 254) of the judgment of Neville, J., in Leetham v. Johnstone-White, 23 T. L. R. 144, is the text for some interesting remarks by Neville, J., in Dottridge v. Crook, 23 T. L. R. 644, on the state of the law as to covenants in restraint of trade, and the effect on business interests of the law as it now stands. Neville, J., while holding himself bound to enforce the law as he finds it, is of opinion that it is in a very unsatisfactory condition, the old rule against covenants in restraint of trade having been so modified by exceptions as now to permit the enforcement of contracts entirely contrary to public policy.

Solicitor.]—On the taxation of a solicitor's bill of costs, the solicitors for the client wrote to the solicitor whose bill was being taxed as follows: "Mr. Fournet" (the client) "has to-day placed in our hands the full amount of your bills so that on the completion of the taxation we shall be in a position to pay the amount certified by the Master to you." After the completion of the taxation the client died, and the solicitors declined to pay the amount of the bill, on the ground that the client was indebted to them for costs. The Court was of opinion that the letter amounted to a declaration of trust, and that the case was one for the exercise of the summary jurisdiction of the Court, and the solicitors were ordered to pay the amount: In re A Solicitor, Ex p. Hales, 23 T. L. R. 573.

THE LATEST ONTARIO DECISIONS.*

Appeal to Court of Appeal.]—An action to set aside two mortgages, one of lands and one of chattels, securing the same debt, amounting to over $1,000, was held by Moss, C.J.O., notwithstanding that it was contended that, pending the litigation, moneys had been realized, reducing the claim below $1,000, while, on the other hand, it was alleged that these moneys would have to be accounted for if the mortgages were avoided, to be within 4 Edw. VII. c. 11, s. 76 (a), and leave to appeal direct to the Court of Appeal from the judgment at the trial was granted: Wade v. Ellictt, 10 O. W. R. 277.

Arbitration and Award.]—The award of the arbitrators sued upon in Garside v. Webb, 10 O. W. R. 235, was made more than 3 months after they had entered upon the reference, without any enlargement in writing by them of the time for making their award. Difficulties arising as to the manner in which the arbitrators were to arrive at the cost of the building erected by the defendant, which was the question submitted, a supplementary agreement was indorsed upon the original submission providing that the defendant should furnish evidence of the actual cost of materials and labour as provided in the original agreement, and that where such were not furnished the arbitrators should use their own judgment in arriving at the cost, and it was also provided that the original agreement should be read as though it contained these provisions. MacMahon, J., decided that this supplementary agreement did not constitute a new submission, and that the award was invalid as not made within the time provided by statute therefor.

*Short notes of the most important cases in Volume IX. of the Ontario Weekly Reporter, No. 19, pp. 993, 994, and Volume X., Nos. 6, 7, 8, pp. 213 to 304, inclusive.

Chattel Mortgage.]—It is decided by MacMahon, J., in McCann Milling Co. v. Martin, 10 O. W. R. 264, following Thompson v. Quirk, 18 S. C. R. 696, that a renewal of a chattel mortgage filed at any time upon the anniversary of the day upon which the mortgage was filed, is a valid renewal, the day of original filing being excluded from the year mentioned in s. 18 of the Act.

Company.]—An appeal by the plaintiffs in Ruethel Mining Co. v. Thorpe from the judgment of Anglin, J., 9 O. W. R. 942, noted ante 438, was dismissed by a Divisional Court: 10 O. W. R. 222.——That the Court, in the exercise of its discretion, will grant a winding-up order, even against the wish of a majority of the creditors of the company, is decided by Britton, J., in Re Charles H. Davis Co. Limited, 9 O. W. R. 993.

Conspiracy.]—The following facts were found by Mulock, C.J., in Rex v. McMichael, 10 O. W. R. 268: that the defendant, as the manager of the Dominion Radiator Company, conducted negotiations with representatives of the Plumbers' Association which culminated in an agreement in May, 1903, under which the members of the association were to receive from the Central Supply Association a preference over outsiders amounting to 20 per cent. of the price paid by such members; and that on behalf of the company he personally signed the agreement; that thereafter as manager of the company he endeavoured to have his company live up to the terms of the agreement; that as representative of the company he took part in negotiations which led to the making of an agreement in October, 1904, under which sales were not to be made to outsiders at all, and in the issuing of lists or directories of those entitled to buy, with a view to his company carrying out the terms of the latter agreement, and in endeavouring to cause his company to live up to the terms of this latter agreement: and that his conduct was not merely that of acquiescence, but of personally promoting the agreements in question and of causing his company to

carry out their terms.' In these circumstances, it was decided that the defendant, having regard to the provisions of s. 61 of the Criminal Code, was guilty as a principal of conspiracy under s. 520 thereof.

Contract.]—The defendant in Freel v. Royal, 10 O. W. R. 258, in answer to a claim to recover possession of a house and lot, set up a parol agreement for a marriage between herself and one McA., who had, at the defendant's instance, purchased the property under a mortgage. McA. had assigned to the plaintiff, and the plaintiff admitted that he was a trustee for McA. The marriage did not take place owing to McA. becoming insane. To take the case out of the Statute of Frauds, the fact that the defendant had been let into possession of the property was shewn, but, it appearing that McA. had had the house repaired and altered with a view to its being occupied by himself and the defendant as a home, Mulock, C.J., decided that her possession was "equivocal, not necessarily suggesting the existence of any contract intended to give her any right to the property, nor unequivocably referable to the parol agreement which she seeks to set up," and that it was, therefore, not a bar to the statute.

Costs.]—In Osterhout v. Fox, 10 O. W. R. 241, upon appeal from the order of Teetzel, J., 10 O. W. R. 157, allowing an appeal from the ruling of a local taxing officer, it is held that the plaintiff's costs were properly taxable upon the County Court scale, his claim having been reduced below $200 by the payment by the defendants to one Dunnett of a sum of $69, at the request of the plaintiff, but whom they had not in any way undertaken to pay, so that that sum could not be considered a payment on account of the annuity sued for, and more evidence would be required by plaintiff to establish his case than is mentioned in 4 Edw. VII. c. 12, s. 1, both on this account and because it would be necessary to prove that the annuitant was still alive.

Crown Patent.]—The conditions contained in Rule 241 are held by Teetzel, J., in Farah v. Bailey, 10 O. W. R. 252, to be, since the repeal of 4 & 5 V. c. 100, s. 29, conditions precedent to be performed by a party aggrieved by a grant of land by the Crown, before he can have his complaints adjudicated upon by the Court, and the fiat of the Attorney-General for the province must be procured. The plaintiffs, purchasers for value, having received a patent from the Crown of a mining claim, a portion of which overlay a strip of the defendants' mining claim, for which, though unpatented, application had been duly filed under the Mines Act, and the discovery and claim duly inspected and passed, were held to be protected by the provisions of s. 45 of the Land Titles Act; the defendants' caution being registered after the grant, it could not be said that the defendants had any title or lien which would affect the plaintiffs' title under s.-s. 4 of s. 26 of the Act.

Division Court.]—An appeal by the plaintiff in Re Shupe v. Young from the order of Falconbridge, C.J., 10 O. W. R. 185, noted ante 508, was dismissed by a Divisional Court: 10 O. W. R. 262.

Easement.]—In Simpson v. T. Eaton Co., 10 O. W. R. 215, Britton, J., discussed the question as to the amount of diminution of light by the erection of a building by an adjoining land owner which will constitute a nuisance and entitle one having an easement for light to recover damages. In this particular case, it was found as a fact that the windows in the plaintiff's house had not been darkened to such an extent as to render the house much less convenient for any use to which it had been or might be put. Moreover, there had been no loss of or diminution in the rents received therefor; and the plaintiff's action was dismissed.

Executors and Administrators.]—Upon an application under Rule 938 (g) in Re Ashman, 10 O. W. R. 250, Riddell, J., directed that the assets of the deceased's estate should

be divided among the widow and brother and sisters claiming, the usual advertisement for claims having been published locally, although there had been another brother who had left Canada in 1876, without stating where he was going, and of whom the only news had been that he was in Oregon and later that he was dead, and for whom diligent inquiry was made, without success, on the death of his father, who left some property in which he would have an interest, if alive. It is pointed out that the statute (R. S. O. 1897 c. 129, s. 38) in referring to creditors and others intended to cover next of kin.

Foreign Divorce.]—The judgment of Anglin, J., in Re Williams and Ancient Order of United Workmen, 10 O. W. R. 50, noted ante 510, was affirmed by a Divisional Court: 10 O. W. R. 215.

Judgment.]—An appeal by the plaintiff in Green v. George from the order of a Divisional Court, 8 O. W. R. 787, 13 O. L. R. 189, noted ante 45, affirming the judgment of Britton, J., 8 O. W. R. 247, noted 26 C. L. T. 581, 593, was dismissed by the Court of Appeal: 10 O. W. R. 292.

Limitation of Actions.]—Calverley v. Lamb, 10 O. W. R. 279, was an action for the recovery of land, as a defence to which the defendant set up the Statute of Limitations. The defendant and one S. each owned one of two houses and lots adjoining. After S.'s death in August, 1895, his widow continued to reside in the house until the autumn of 1906, but the 3 acres of land adjoining was occupied and worked by the defendant under an arrangement with the widow, said by the defendant to be in effect a gift from her, but found by Riddell, J., to be at a rental of $12 per annum, and to have been entered into some time in the autumn of 1897, in which case the statute would not begin to run until 1898. On the other hand, it is decided that if the defendant entered as a trespasser, the widow, being in possession of part of the property, was, in contemplation of law, in possession of the whole.

It is held that a party claiming property by virtue of the Statute of Limitations must prove affirmatively the non-payment of rent, where the relationship of landlord and tenant is shewn to have existed.

Master in Chambers.]—It is decided by the Master in Chambers in Re Coleman and Union Trust Co., 10 O. W. R. 245, that he has no jurisdiction to hear a motion under s. 7 (b) of the Arbitration Act (R. S. O. 1897 c. 62, as amended by 6 Edw. VII. c. 19, s. 13), for an order removing an arbitrator.

Municipal Corporations.]—A Divisional Court in Donaldson v. Township of Dereham, 10 O. W. R. 220, held that, as to the plaintiff's claim for damages sustained by reason of the loss of access to his property from the highway occasioned by a drain constructed by the defendants, the work done by the defendants was clearly work within the authority given them by the statute; that they were not tort-feasors; that no negligence was proved; and that the right, if any, of the plaintiff was for compensation under s. 447 of the Municipal Act. Besides, no right to compensation could exist in the plaintiff, since the acts complained of were committed before he purchased.——The question for decision in County of Dufferin v. County of Wellington, 10 O. W. R. 239, an action under s. 617 of the Municipal Act, for a declaration that the two counties were liable for the building and maintenance of what was alleged to be a bridge crossing the boundary line between two townships, one in each county, was whether the structure was a bridge or a culvert. Falconbridge, C.J., finds the word "culvert" to be of obscure origin, but upon recourse to the "dernier eri" in dictionary-making (that issued from the Clarendon Press, Oxford, edited by Dr. James A. Murray) he finds that a bridge is an erection whose essential purpose is to carry a road at a desired height over a river, and its channel, a chasm or the like; while that of a culvert is to afford a passage for a small crossing stream under the embankment of a railway or a highway, or be-

neath a road where the configuration of the surface does not require a bridge. The structure in question, a circular concrete pipe with an inside diameter of 3 feet, crossing the road, through which flowed the water of an artificial channel or ditch, is, therefore, held to be a culvert and not a bridge, and the action dismissed.

Negligence.]—A judgment, upon the findings of a jury, in favour of the plaintiff, was set aside by the Court of Appeal in Harris v. London Street R. W. Co., 10 O. W. R. 302, an action for damages for personal injury resulting from a collision between a car of the defendants, upon which the plaintiff was motorman, and a car ahead of it upon the same line, which was stalled or "stranded," because, while the men in charge of the latter car were negligent in failing to signal the following car of its situation, the plaintiff was the author of his own injury by reason of his disobedience of rule 212 of the company in not bringing his car to a stop when he found the current was off, as he had time to do.

Railway.]—In Re Canadian Pacific R. W. Co. and Byrne, 10 O. W. R. 278, Riddell, J., following Re Dolsen, 13 P. R. 84, under the provisions of s. 184 of the Railway Act, R. S. C. 1906 c. 37, made an order giving power to the widow of a deceased land owner, who by his will had given her a life estate in his lands, with remainder to his children, to sell and convey to the railway company a part of the lands required for right of way, and the rights of the children, who were infants, therein; this power, joined to her legal power as tenant for life, would enable her to sell and convey the fee. ——In Villeneuve v. Canadian Pacific R. W. Co., 10 O. W. R. 287, upon a motion for judgment in the terms agreed upon by the parties, and for the approval thereof by the Court on behalf of the infant plaintiffs, and for an apportionment and for payment into Court of the infants' share of the damages payable by the defendants for the death of the husband of the adult plaintiff, Riddell, J., while of opinion that the act of omission or negligence which resulted in the death, was

such as to render the defendants subject to indictment and some of their officers or employees liable to a prosecution for manslaughter, considered that, on the authority of Wells v. Abraham, L. R. 7 Q. B. 554, he had the right to give judgment in terms of the settlement mentioned, although the action was not being tried.

Solicitor.]—In allowing an appeal by the client in Re Solicitor, 10 O. W. R. 226, from a report upon the taxation of a bill of costs rendered by the solicitor to the client, allowing the solicitor two items of $625 and $200, the first stipulated for at the commencement of an action for damages for personal injury, as a percentage upon the amount which should be recovered, and the second while the action was pending, Boyd, C., says in part: "The confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by the tariff and the practice of the Courts. Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim, as compensation for his services. Such a transaction is in contravention of the statute relating to champerty, and it is also a violation of the solemn engagement entered into by the barrister upon his call to the bar." The retaining of these moneys by the solicitor out of the moneys recovered was held not to be a payment by the client which would prevent the items being disallowed.

Vendor and Purchaser.]—The plaintiff in Bradley v. Bradley, 10 O. W. R. 223, upon the settlement of an administration action, entered into an agreement with certain of the defendants whereby he secured an option to purchase a certain farm. He offered the farm for sale by auction, but it was not sold, owing as alleged to the action of the defendants, and a sale he had arranged privately also fell through. He sued for damages, and his action was dismissed by Boyd, C., who held that his loss was due to his failure to carry out the purchase of the farm under his option; that he had no

right to offer the farm for sale, but only his option; and that the action of the defendants in stopping the attempted sale was justifiable.——In the beginning of the transaction in question in Bowerman v. Fraser, 10 O. W. R. 229, P. was acting as agent for the sale of the property of the defendant, and McT. was a sub-agent. Having secured an offer of purchase from the plaintiff, McT. procured it to be accepted by the defendant on condition that it was only to be delivered to the plaintiff upon the latter giving a letter stating that he would commence building by a certain date. McT. secured a letter, which he thought would be satisfactory, and delivered the agreement. The defendant contended that this letter was not what he stipulated for, and refused to carry out the agreement. Britton, J., in decreeing specific performance, held that in delivering the agreement, McT. was the agent of the defendant and not of the plaintiff, and that the defendant was bound, and that, in any event, the defendant was bound by his acceptance and retention of a cheque of McT. for $25 on account of the purchase money paid by the plaintiff at the time the agreement was handed over. It was also decided that the expression "time shall be the essence of this offer" refers only to the acceptance of the offer, and not to the agreement resultant therefrom.

Wharf.]—It is laid down by the Court of Appeal in allowing an appeal in Hamilton Steamboat Co. v. Mackay from the judgment of Mabee, J., 7 O. W. R. 465, noted 26 C. L. T. 355, that the rule of law that a grantor cannot derogate from his own grant, does not confer upon a grantee a right to insist upon his grantor limiting the use of premises retained by him to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant to the knowledge of the grantee, and it is pointed out that, if the rights of the parties to the use of the slip in question were to be dealt with, it must be by ascertaining whether there was any unreasonable use by either party of the waters forming a public highway between their respective properties: 10 O. W. R. 295.

Will.]—A gift in a will of "all messuages, lands, tenements, and hereditaments, and all my household furniture, ready money, securities for money, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever, unto my beloved wife Ellen Newbigging, her heirs, executors, administrators, and assigns, to and for her own absolute use and benefit during her natural life and then to heirs," was held by Clute, J., in Re Newbigging, 10 O. W. R. 213, to come within the rule in Shelley's case, giving the wife an estate in fee simple in the realty, and giving her the personalty absolutely. The word "heirs" where last used in the clause quoted was held to mean her heirs, for, were it taken to mean the heirs of the testator, the previous words "heirs, executors, administrators, and assigns" would be meaningless.

DECISIONS FROM THE COURTS OF QUEBEC AND THE MARITIME PROVINCES.*

Assignments and Preferences.]—The first point decided by Barker, J., in an interesting judgment in Tooke Bros. Limited v. Brock & Patterson Limited (N.B.), 3 E. L. R. 270, is, that an amendment may properly be made in a suit begun by creditors to set aside as preferential certain chattel mortgages made by their debtor to the defendants, by adding his assignees for the benefit of creditors as parties plaintiffs, an assignment having been made under the Assignments and Preferences Act, C. S. N. B. c. 141, pendente lite. The second point is, that the plaintiffs who commenced the suit as creditors of P., the insolvent, had a right to base their suit solely on the ground that, as against them, the preferential mortgages were void under s. 2 of the Act. Its provisions being similar to those of the Ontario Act, Attorney-General for Ontario v. Attorney-General for Canada, [1894] A. C. 189, was regarded as sufficient authority for holding that the Act was not ultra vires. Upon the merits of the case, it was found that the debtor was insolvent, at the time he made the chattel mortgages, to the knowledge of the preferred creditors, and that a previous agreement to give them, but not until required, in order to save the credit of P., could not be relied upon as in any way assisting the defendants or rebutting the presumption of fraud which they had to meet, the assignment having been made within 60 days after the mortgages.

Company.]—In Farrell v. Manchester (N.B.), 3 E. L. R. 244, it was sought to make two directors responsible for the misrepresentations of an agent of an incorporated company, whereby the plaintiff was induced to purchase shares,

* Short notes of the most important cases in Volume III. of the Eastern Law Reporter, No. 6, pp. 241 to 296, inclusive.

but the proof of authorization or approval by the directors of the statements contained in a sort of private prospectus issued by the agent which was before the plaintiff when he bought, failed, and the action was dismissed as against the directors. The company was also made a defendant, and rescission of the sale of the shares as against the company, and, as incidental thereto, restitution of the money paid, would have been adjudged by Barker, J., had he not deemed that the plaintiff had precluded himself by his laches from that relief. The bill was not filed until, according to one view of the facts, 11 months, or according to another 8 months, after the plaintiff had discovered the falsity of the representations upon which he bought, and either period was considered too long for the plaintiff to sleep upon his rights.

Criminal Law.]—Rex v. Hamelin (Que.), 3 E. L. R. 279, is noteworthy because of the extraordinary decision of the magistrate presiding over the preliminary investigation, who discharged the accused from custody, on application by their counsel, because the warrants charging them with manslaughter and rioting were irregular, inasmuch as they did not have affixed to them the stamps required by law. This decision has been held up to scorn by the press throughout the Dominion. The magistrate refused to reserve a case; but the Court of King's Bench, in a short judgment delivered by Trenholme, J., gave leave to appeal and directed a case to be stated, on the application of the Crown, holding that the decision of the magistrate was upon a question of law arising upon the preliminary proceedings.

Witness's Religious Belief.]—After a witness had been sworn in the usual way, but before he gave any evidence, his competency as a witness was challenged on the ground of his religious belief, and Bell v. Bell, 34 N. B. R. 615, was cited as shewing that his evidence should be rejected. He was interrogated as to his belief, and the result of his answers was that he believed in a Supreme Power—a God as

defined by Christ's teaching in the New Testament; he believed in heaven and hell, and in a future state of rewards and punishments, but he did not believe that he was under any greater obligation to tell the truth by reason of taking the oath, and he did not believe that a person who swore falsely would be punished in the hereafter. "It would be a mistake," said Barker, J., "in this age, with its almost endless variety of religious thought and beliefs, to refine too much in determining as to the competency of a witness. The taking of an oath implies a belief in God, to whom an appeal is made. The two important points, I think, are a belief in God and a belief in a future state of rewards and punishments. The witness believes in both. The witness in Bell v. Bell did not believe in either. I think this was a competent witness:" Farrell v. Manchester (N.B.), 3 E. L. R. 244.

EDITORIAL REVIEW.

The Prisoner and the Dock.

A memorandum from the Department of the Attorney-General for Ontario calls attention to the "uncertainty regarding the cases in which defendants when on trial must stand in the dock," and suggests that it is "desirable that the practice should be definitely settled." In Archbold's Criminal Pleading, 23rd ed., p. 186, the rule is thus expressed: "No trial for felony can be had except in the presence of the defendant, and he must, it is said, stand in the dock to be tried;" citing Regina v. St. George, 9 C. & P. 483; Regina v. Douglas, C. & Mar. 193; Regina v. Zulueta, 1 C. & K. 215, 1 Cox 20. In Roscoe's Criminal Evidence, 12th ed., p. 171, it is said: "In all cases of felony the prisoner must take his place within the dock." As, under the Criminal Code, cases are no longer divided into felonies and misdemeanours, it is suggested that the reasonable course would be to hold that the rule as to the prisoner standing in the dock should apply in all cases where on conviction the punishment may be as much as 5 years' imprisonment. It is not pointed out in the departmental memorandum, but it is the fact, that the present Chief Justice of the King's Bench and the late Mr. Justice Rose, adopted the rule now suggested immediately after the coming into force of the Criminal Code.

Another Toronto Railway Case before the Privy Council.

Before the Judicial Committee of the Privy Council in July (present, Lord Robertson, Lord Collins, Sir Arthur Wilson, Sir Elzear Taschereau, and Sir Alfred Wills), a motion in Toronto R. W. Co. v. King and another, by the Toronto Railway Company, for special leave to appeal from a decision of the Court of Appeal for Ontario, was heard.

Sir Robert Finlay, K.C., and Mr. D. L. McCarthy (of the Ontario Bar) appeared for the petitioners; Mr. J. H. Moss (of the Ontario Bar) for the respondents.

On the 21st December, 1905, a collision occurred between one of the tramcars of the Toronto Railway Company and a covered delivery van driven by David King, at the intersection of Yonge and Adelaide streets, Toronto. As the result of the collision King was thrown out and injured, and subsequently died. An action was brought by his representatives against the company, claiming $10,000 damages, on the ground of alleged negligence on the part of the company. The action was tried on the 16th and 17th January, 1906, before Chief Justice Meredith and a jury, when judgment was directed to be entered for the plaintiffs for the sum of $4,500 and costs, upon the findings of the jury. The petition stated that at the conclusion of the plaintiffs' case counsel for the company attempted to move for a nonsuit, on the ground that upon the admitted facts no evidence of negligence was disclosed. The Judge, however, declined to nonsuit, and on the 18th January he delivered judgment, in which he said that, as there was "some slight evidence of negligence," he had directed the case to go to the jury, but he doubted whether an appellate court would take the same view. The company appealed to the Court of Appeal for Ontario, which gave judgment directing a new trial, but two of the Judges dissented, being of opinion that the case should have been withdrawn from the jury and the plaintiffs nonsuited. From that judgment the company endeavoured to appeal to the Supreme Court of Canada, but it was decided that that Court had no jurisdiction to hear the appeal. An application was then made by the company to a Judge of the Court of Appeal in Chambers, to allow their bond as sufficient security on an appeal which they proposed to prefer to his Majesty in Council. The application was referred to the full Court. That Court suggested to the plaintiffs' counsel the advisability of moving before the Master in Chambers to amend their claim by re-

ducing the sum claimed below the appealable amount which entitled the company to appeal to his Majesty in Council. The plaintiffs, accordingly, applied to the Master to amend their statement of claim by reducing the amount claimed to $3,999, being $1 less than the appealable amount. From the order of the Master permitting the amendment the company appealed to a Judge in Chambers, but, before the appeal could be disposed of, the Court of Appeal gave judgment on the company's application to allow the security, refusing the application, on the ground that the amount claimed by the plaintiffs was less than the amount which entitled the company to appeal to his Majesty in Council. Sir Robert Finlay placed before their Lordships the arguments in support of the petition. The question involved in the appeal was of the utmost importance to litigants generally in the province of Ontario, and there was no more disputed question among the Judges than the right to a nonsuit, so much so, that some Judges had declared that under no circumstances would they grant a nonsuit, there being such diversity of opinion among them on this point. The company had the right, by virtue of chapter 48 of the Revised Statutes of Ontario, 1897, to appeal to his Majesty in Council without leave, but that right was taken away from them by the amendment allowed to the plaintiffs' claim, and the Court of Appeal for Ontario had, by their action, constituted themselves the ultimate Court of Appeal in this and similar cases. The Court of Appeal for Ontario had, in their decisions on the question of negligence, practically ignored the decisions of the accepted authorities in England for the past 50 years, and had laid down the rule that all questions of contributory negligence must be left to the jury, and it was in the public interest that this question should be settled by some authoritative decision of his Majesty in Council. Mr. Moss, for the respondents, opposed the petition. At the close of the arguments, Lord Robertson said that their Lordships would humbly advise his Majesty to grant leave to appeal on the usual terms.

Long Judgments in Appellate Courts.

The days of long judgments in the House of Lords seem to be past, many appeals being disposed of in judgments which do not make half a column in the Times. This is especially so in the cases where there has been consideration. One or two judgments are written and delivered, and the other Lords present content themselves with concurring. In the Court of Appeal, especially in that division presided over by Lord Justice Vaughan Williams, as constituted, the tendency has been all the other way. Indeed, a short time back, two considered judgments—in one of which Lord Justice Moulton and in the other Lord Justice Buckley dissented — took exactly three hours to deliver, the dissenting judgment of Lord Justice Moulton occupying one hour. Judging from the mental strain that such lengthy judgments are to the listener, one can only suppose they must involve heavy mental work to their Lordships, and viewed from the time they occupy to deliver and the expense to the parties, it seems doubtful if anything can be said in favour of giving judgments of inordinate length. The attempt to get abreast of the work in the Court of Appeal, by abandoning the alternate Saturday off, and sitting to hear interlocutories at 10 a.m. on Saturdays, to say nothing of the request to be empowered by new legislation to sit in three divisions, looks as if it had all been prompted by a misdirected desire to give themselves the greatest possible number of hours of work, while obviously an easier solution of the problem of how to deal with arrears was to be found by following the example of the final tribunal, and contenting themselves with shorter judgments whether written or oral.—*London Law Times.*

The Passing of the Old Bailey.

The announcement that the site of the old Sessions-House, Old Bailey, is to be submitted to auction, revives memories of many famous trials in the disused building. The origin of the term "Old Bailey" is not altogether clear,

but there seems to be reason for the suggestion that it meant the Ballium, or outer space beyond the city wall, a portion of which, indeed, lies at the back of the site about to be sold. According to Stow, as early as 1356 this site was granted to the Chamberlain, who seems to have held his court there; but the recently demolished building was comparatively modern, having been built after the destruction of the former Session-house in the Gordon Riots of 1780. Of all the celebrated trials which have been held at the Old Bailey, perhaps none is more picturesque than that of the Regicides, who were tried there after the Restoration, when ten of them were executed. Lord William Russell was tried and condemned at the Old Bailey in 1683 for alleged complicity in the Rye House Plot, and, by a curious coincidence, Courvoisier, the murderer of another Lord William Russell, was tried at the old Sessions-house some 150 years afterwards—a trial ever memorable for the controversy excited by the dramatic defence by Phillips after the prisoner had confessed to him the commission of the crime.—*London Law Times.*

Recent American Decisions.

Alimony.—A decree for permanent alimony is held, in Fournier v. Clutton (Mich.), 7 L. R. A. (N.S.) 179, not to be assignable.

Criminal Law.—The imposition of cumulative sentences in a criminal action, the aggregate of which exceeds the jurisdiction of the Court to impose, is held, in Harris v. Lang (App. D. C.), 7 L. R. A. (N.S.) 124, not to render the entire sentence void, the sentence being held valid for the term which the court has jurisdiction to impose.

The right to take a photograph of a person who is accused but not yet convicted, of crime, for the purpose of placing it in the rogues' gallery, is denied in Schulman v. Whitaker (La.), 7 L. R. A. (N.S.) 274, where the picture is not necessary for identification of the person or for detection of crime.

Damages.—Damages for loss of baggage by a carrier are held, in Turner v. Southern R. Co. (S. C.), 7 L. R. A. (N. S.) 188, not to include the trouble and expense of trying to locate it, or in purchasing other wearing apparel to replace that lost, in the absence of notice to the carrier, at the time of delivering the baggage to him, of facts which would render special damages probable.

Evidence.—That the identity of a corpse found partly consumed in a fire may, for the purpose of proving the corpus delicti in a prosecution for murder, be established by circumstantial evidence, such as the size of the remains, and the finding, at and near the spot where the body was found, of articles known to have belonged to a person who is alleged to have been killed, is held, in State v. Barnes (Or.), 7 L. R. A. (N.S.) 181, the weight and sufficiency of the evidence for that purpose being for the jury to determine.

Jury.—The right of an appellate Court to set aside a finding of the jury, upon the ground that it is contrary to scientific principles, is sustained in Chybowski v. Bucyrus Co. (Wis.), 7 L. R. A. (N.S.) 357.

Nuisance.—The maintenance of howling and barking dogs and whining puppies on neighbouring premises, to the great and continuous annoyance and discomfort of a property holder and his family, so that their rest is broken, sleep interrupted, and the reasonable use and enjoyment of their home disturbed, is held, in Herring v. Wilton (Va.), 7 L. R. A. (N.S.) 349, to be a nuisance subject to be enjoined.

Street Railways.—A street car passenger who is given an invalid transfer check upon paying his fare and asking for a transfer, to which he is entitled, is held, in Little Rock R. & E. Co. v. Goerner (Ark.), 7 L. R. A. (N. S.) 97, to have no right, upon refusal by the conductor of the connecting carrier to honour it, to

refuse to pay his fare, thereby rendering necessary forcible ejection, and hold the carrier liable for the assault; and his remedy is held to be confined to damages for the breach of contract, including reasonable compensation for the indignity put upon him through the fault of the company.

A condition on a transfer issued by a street railway company, that the holder by accepting agrees that, should any controversy arise as to its validity, he will pay his fare and call at the company's office for correction, is held, in Georgia R. & E. Co. v. Baker (Ga.), 7 L. R. A. (N.S.) 103, to be unreasonable and void.

The liability of a street railway company for the wrongful arrest of a passenger at the instance of the conductor of a car is sustained in Schmidt v. New Orleans R. Co. (La.), 7 L. R. A. (N.S.) 162, although the conductors were forbidden by the company to do any police duty.

That the motorman of a street car sees a person has something in his hand and is making violent motions towards the car, at a place near the track, where the car is not required to stop for passengers, is held, in Woas v. St. Louis Transit Co. (Mo.), 7 L. R. A. (N.S.) 231, not to charge him with notice that his failure to stop the car will result in the throwing of a missile at himself which may strike and injure a passenger, and charge him with the duty of protecting the passenger, so as to render the company liable for injury to the passenger by his neglect so to do.

BOOK NOTICE.

Cockle's Leading Cases on the Law of Evidence with Notes.—By Ernest Cockle, of Gray's Inn, Barrister-at-law, London: Sweet and Maxwell, Limited.

The law of evidence is almost entirely case law; yet, hitherto, no collection of leading cases on the subject has been published in England or the colonies, so far as we know. This book is an attempt to supply an apparent want. The book is not a large one (224 pages, besides tables of cases and contents), but it has cost the author, we surmise, an immense amount of time and trouble. Many of the cases, as found in the reports, are not primarily on the subject of evidence; the dicta had to be dug out of by-paths, so to speak. The table of contents, which is unusually full and systematic, read together with the head-notes of the cases (which are printed in large clear type), will give a fairly complete outline of the law of evidence. The scheme of the work is a good one, and it is well carried out. It may safely be commended to students, and, perhaps, especially to the young counsel, whose difficulty is often not so much with the facts or the substantive law of the case in hand, but with the manner in which the case must be presented at the trial. They will find nearly all questions as to the competency of evidence solved in this little work.

PERIODICALS AND PAMPHLETS.

Federal Reporter (National Reporter System, St. Paul, Minn., 18th and 25th July, 1907.)

General Digest American and English (Monthly Advance Sheets, Rochester, N.Y., No. 61, June, 1907.)

The Law Student's Helper (Detroit, Mich., July, 1907.)

Chicago Legal News (13th, 20th, 27th July, 1907.)

Central Law Journal (St. Louis, Mo., 28th June, 19th July, 1907.)

Calcutta Weekly Notes (10th, 17th, 24th June, 1907.)

Criminal Law Notes (Pawatipur, India, April, 1907.)

Madras Law Journal (April, 1907.)

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Denton (J.H.), Municipal Negligence Respecting Highways.

This is a work that will be found valuable in every Province of the Dominion. The Canadian Cases are brought down to date, and our law compared with the law found in the United States. The American law is given upon all points which have not been dealt with in our own or the English Courts.

Contents:—The Nature and Extent of the Liability at Common Law; Misfeasance and Nonfeasance; Statutory Liability; Indictment and Mandamus; Liability respecting Streets; Liability respecting Township Roads and Highways; Sidewalks and Crossings; Bridges; Bicycles and Automobiles; Respondeat Superior; Municipal Knowledge of the Defect; Notice of the Accident; Proximate Cause; Contributory Negligence; Remedy Over; Evidence and Damages. 1906. 11f.-cf., $5.

In the case "Campbell v. Townships of Brooke and Metcalfe," 8 O. W. R. 292, Falconbridge, C.J., is reported as saying: "The subject is discussed and the authorities are collected in Mr. Denton's valuable work on this branch of Municipal Negligence, p. 113 et seq."

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CHURCH LAW.

CASES involving questions of church law are not of very frequent occurrence in Ontario. But when they do arise they are sometimes found to be the most difficult kind of litigation that the lawyer has to deal with. Here we have no body of ecclesiastical lawyers, familiar with the peculiar terms and phraseology of that branch of law, and the practitioner may have to plunge into an entirely new and unknown region in some particular case, for the first time.

With regard to most of the religious organizations in this province, the statute law governing their rights of property are to be found in statutes of comparatively recent date, and they have the great advantage of that fact; but with one religious body, namely, the Church of England, the case is somewhat different. The law relating to that particular organization is by no means as readily ascertained. By the Church Temporalities Act of Upper Canada, 3 V. c. 74, certain statutory powers in regard to property were given to that particular religious body, and certain provisions are thereby made respecting the organization of vestries, and the rights and liabilities of the clergy, churchwardens, and pewholders. The ecclesiastical organization of the mother church having been in a large measure reproduced in the daughter church in this country, and the law of England in regard to property and civil rights having been introduced by our earliest Provincial statute, it followed that for the purpose of determining ecclesiastical rights of property in the Anglican

Church in Ontario, the common law and Imperial statute law then in force, affecting ecclesiastical rights of property in England, became the rule of decision in this Province as far as applicable. The right of patronage, or nomination of a rector to a vacant rectory, is one of the peculiar features incident to the organization of the Church of England, and is a species of ecclesiastical property known as an "advowson." Not only is this a right of property, but it has been in England held to be assets for the payment of debts. It is a right whose value from a monetary point of view is measured by the amount of the income of the benefice in respect of which it exists, and presupposes that the Church is endowed. Such rights were created in this Province under the Constitutional Act, 31 Geo. III. c. 31, which among other things authorized the establishment of Church of England rectories, the patronage of which was to be in the Crown. And the Church Temporalities Act (supra), s. 17, also authorized the creation of such rights by private persons. This right of presentation or nomination was by the common law of England conceded to the founders of churches and their heirs. It was a right sometimes annexed to a particular manor, and was then "appendant;" or, if not so annexed, it was in "gross." In this Province there seems to be no possibility of creating an advowson otherwise than in gross. But an advowson being created, where are we to find the law which regulates it, except it be in the common law, and those Imperial statutes which, as affecting property, were incorporated into our provincial law by the statute of Upper Canada 32 Geo. III. c. 1?

The question whether the English law regulating ecclesiastical rights to property was in force in Ontario was raised in the case of Lyster v. Kirkpatrick, 26 U. C. R. 217, and Draper, C.J., there said (p. 224): "If I am right in supposing that it was intended to urge that the law of England in reference to the rights and powers of rectors, or parsons, as to the lands vested in them as their glebes or endowments appurtenant to their rectory or parsonage, are not introduced and in

force in this province, I have no hesitation in affirming my clear opinion to the contrary. That the law of England, under which ecclesiastical courts are constituted, and ecclesiastical jurisdiction is administered in such courts, forms no part of our law, I fully admit, as I do that the Church of England has no legal status or privilege in that character differing from the Church of Scotland, or any other body or denomination of Protestants in this province. . . . And, in my opinion, the first statute passed in Upper Canada puts this beyond all doubt, by enacting that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as the rule for decision. The question in this case is a right of property, claimed in a charter senctioned by the 31 Geo. III.,* and within the limitations of that statute the question must be decided according to that rule. This law has been recognized on more than one occasion by our Courts, as in The Attorney-General v. Lauder, 9 Gr. 461, and Hill v. McKinnon, 16 U. C. R. 216, and other cases. Hence I conclude that the enabling and restraining statutes of Henry VIII. and Elizabeth are in force and apply to leases made by rectors in Upper Canada."

In the case of Attorney-General v. Lauder, the right of presentation to a rectory created by the Crown was in question. The advowsons of such rectories were, as we have said, by the Constitutional Act, at first vested in the Crown, but were by subsequent legislation in 1852 (14 & 15 V. c. 175, s. 4), transferred to the Church Societies of the Church of England in the dioceses in which the rectories were situate, and on the incorporation of diocesan synods were transferred to them. The effect of this legislation is thus summarized by Vankoughnet, C., in Attorney-General v. Lauder (9 Gr. at p. 470): "We have only to read the Act to see that the legislature intended to sever all connexion between the Crown, or the government as representing the public generally, and the Church of England, and to leave to the latter the

* This Act was the Constitutional Act above referred to.

exclusive management of its own affairs of every description. The Crown surrenders all interference in them, and the legislature practically says this—'the connexion between you and the Crown as representing the general public has been inconvenient and impolitic—we get rid of it—we do not interfere with any rights you have, but we give you the exclusive use of them—we have, or rather the Crown, subject to our right to interfere with and dispose of them, has the patronage of presentation to livings—we think it no longer expedient that the Crown should use it—and we are indifferent how you use it, but to enable you to do so in the manner most acceptable to your community, we place it in the possession of the body recognized by law as your representative and under your control. That body may do with it as it pleases, and we have no further concern in the matter; and it may deal with it by by-law,' the usual mode of declaring the corporate will and act."

This was said with regard to the patronage of Crown rectories, but it is doubtful whether it is equally applicable to those ultimate rights of presentation which by English ecclesiastical law are vested in the Crown, in cases of lapse owing to vacant rectories not being filled within a certain defined time; but it is extremely unlikely that such ultimate right, even if it exists in this Province, would ever be actively exercised by the Crown.

Some of the most ancient Imperial statutes deal with advowsons, and any lawyer who may have adopted the notion that the Church of England dates its origin from the Reformation era must be somewhat puzzled when he finds that many of the laws which now regulate the rights of the clergy and laity of that Church date long prior to its supposed origin, and that, not by reason of any legislation of the post Reformation era, making such laws applicable to the supposed new Church, but by reason of the fact that the lawyers of England appear to have been entirely ignorant that any new Church had been established, and to have always regarded

the Church as it now exists as having had a continuous historic existence from the earliest times to the present day, and consequently that statutes passed in regard to the Church of England in pre-Reformation days still apply to the Church unless they have been expressly repealed or superseded by later statutes.

Many of these old statutes may therefore be found applicable to the Church of England in Ontario; and so far as they are applicable they are unaffected by the consolidation of the Imperial statutes contained in the third volume of the R. S. O.: see schedule C., p. 3915.

One of the most ancient statutes dealing with the rights to advowsons is the Statute of Westminster, 13 Edw. I. c. 5. It recites that for the recovery of advowsons in case of disturbance there were three original writs, namely, the writ of right, and two writs of possession, viz., the writ darrein presentment, and the writ quare impedit; and that where a person having no right presented, and his clerk was admitted, the patron had only a writ of right which should be "tried by battail" or by great assize, whereby infant heirs were sometimes defrauded of their rights, and it was therefore provided that in such cases they should not be put to their writ of right, but should have a writ of advowson possessory; as also where presentations were made unto churches being of the inheritance of married women. This provision, it may be, is still in force as establishing the rights of infant patrons to bring possessory actions for the recovery of advowsons, though the procedure in this, as in all other actions, has now been modified by our Judicature Act. The statute also provides that in such actions the defence of "plenarty" shall not prevail if the action be brought within six months, which would seem to be a provision still operative. It also provides that in actions of darrein presentment and quare impedit, if by reason of the disturbance the Bishop has appointed and the patron has lost his presentation, for that time damages for two years' value of the church shall be

awarded to the patron; and, if he has not lost his presentation, half a year's value shall be awarded, and in default of payment of the two years' value, the defendant was made liable to two years' imprisonment. And if the advowson were recovered within six months, yet the defendant was to be punished by imprisonment for half a year. These provisions as to imprisonment, however, would seem now somewhat to conflict with our legislation abolishing imprisonment for debt; although it may be said that the imprisonment here imposed is not strictly of that character, but rather punitive for the protection of a right of property. But, in any case, such provisions are clearly opposed to the general trend of modern legislation. The statute of 16 Richard II. c. 5, inter alia, provides that the right to recover presentations to benefices is in the King's Court, and that the execution thereof is to be by the Bishop; but in Ontario the execution of all judgments of the High Court would, no doubt, now be held to rest with the sheriff.

An ancient statute of the 14th century, but of uncertain date, deals with the subject of churchyards, and timber growing therein, and the relative rights of the parson and parishioners thereto. It declares that trees growing in the churchyard "ought to be numbered amongst the church goods, the disposing whereof is not given to laymen, but, as the Holy Scripture witnesseth, the care of disposing of them, being undiscussed by God, ought to be committed unto priests only." But it provides that, as such trees are often planted as a protection to the church, the parsons are not to fell them, except when the chancel of the church needs repair; but they may, as a matter of charity, also allow them to be used for the repair of the body of the church. And here it may be noted that according to English law the burden of repairing the chancel, in the absence of a custom to the contrary, rests of common right in the rector; and the parishioners were bound to repair the nave: Cripps' Law of the Church, 6th ed., p. 393; but it would seem doubtful if any such burden could be thrown on rectors in Ontario, even in the case of

endowed parishes. It would also seem, according to English law, that the parson is entitled to an exclusive use of the vestry attached to his church: Cripps, p. 394.

Under the Church Temporalities Act, supra, s. 1, the soil and freehold of the church and churchyard is in the incumbent for the time being; but the possession is declared to be in the incumbent for the time being and the churchwardens; any action in respect of the church or churchyard would therefore, it would seem, have to be brought in the joint names of the rector and wardens (see s. 6); whereas the freehold and possession of the glebe, where it has been granted to the incumbent and his successors (see s. 16), would appear to be in the incumbent for the time being, and he alone would have any right of action for injuries thereto.

The statute of 28 Hen. VIII. c. 11 provides that the profits of ecclesiastical benefices, &c., accruing during the vacancy of the benefice, &c., are to belong to the successor and his executors, "toward the payment of first fruits to the King and his successors;" but the payment of first fruits has never been, and probably could never hereafter be, exacted in Ontario, and it would, therefore, seem that, subject to any legislation to the contrary, the successor of any benefice in Ontario would be entitled to the profits thereof accrued during the vacancy, free from any liability for "first fruits," but subject to the deductions hereafter mentioned.

This statute, moreover, provides a penalty for the Ordinary receiving profits during a vacancy, and not accounting for them to the successor, less the proper charges for collecting and providing for the expenses of the cure during the vacancy. This statute also empowers an incumbent to bequeath the profits of corn planted by him and growing upon his glebe at the time of his decease.

It also contains certain provisions as to leases by vicars and other spiritual persons, becoming void by their resigna-

tion, and provides that such leases shall be good for six years after such resignation, or avoidance by their successors. This part of the Act, though repealed in England, would appear to be still in force in Ontario, though, as we shall see, later statutes have enabled parsons, within certain limits, to make leases of their lands so as to be binding on their successors.

This statute also provided that a successor may, on one month's notice after his induction, have possession of the parsonage with the glebe belonging to the same, not being sown at the time of his predecessor's death, "deducting therefor in his rent as heretofore hath been borne for the same, or as it is reasonable worth," whatever that may mean. See also the Statute of Marlbridge, 52 Hen. III. c. 28. The statute also provides that if the fruits of the benefice are not sufficient to pay the curate's stipend and wages for serving the church during the vacancy, then the successor is to pay the deficiency within 14 days after he obtains possession. But we doubt whether that would have any practical application in Ontario, except perhaps in the case of endowed parishes.

The leasing of lands held by ecclesiastical persons in right of their churches, has been a very fruitful subject of legislation. By the common law parsons, and other spiritual persons, having only an estate in the land during their actual occupancy of the rectory or bishopric to which the lands belonged, could not make leases which would be binding on their successors; consequently on their death or resignation, any leases made by them would be voidable by their successors; great hardship often resulted to the lessees of ecclesiastical property from this state of the law: see 28 Hen. VIII. c. 11, above referred to, and to provide a further remedy for this evil, 32 Hen. VIII. c. 28 enabled parsons and other persons holding lands in right of their churches to make valid leases for 21 years, or three lives, reserving the customary rent. The power thus given is subject to certain exceptions, and does not authorize leases to be made without impeachment of waste.

But by 13 Eliz. c. 20, no lease was to be made of any benefice to endure longer "than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above four score days in any one year;" and, by the same statute, all charges on the profits of benefices, other than rents to be reserved on leases, were declared void. This statute seems, as far as leasing goes, to conflict with the statute of 32 Hen. VIII. c. 28, above referred to, and 13 Eliz. c. 10, and 14 Eliz. c. 11, hereafter mentioned. The Act, so far as it relatse to leases of benefices, was repealed in England by 57 Geo. III. c. 99, s. 1, but that repeal would not affect its operation in Ontario.

By 1 Eliz. c. 19, s. 4, all grants by Archbishops and Bishops, except to the Crown, of lands belonging to their sees, for any term exceeding twenty-one years, at the usual rents, are declared void; but see 14 Eliz. c. 11, hereafter referred to.

13 Elizabeth c. 10 is a statute which deals with the subject of dilapidations and frauds by ecclesiastics, the dilapidations referred to being those suffered or permitted by them in regard to the lands held in right of their churches, and for which their personal representatives are made responsible to their successors. (By 14 Eliz. c. 11, s. 6, money so recovered is required to be expended within two years of its receipt, upon the buildings and reparations in respect of which it shall have been received.) It also invalidates leases by parsons, and other spiritual persons, of lands belonging to their churches, &c., for any greater period than three lives or 21 years, at the accustomed rent.

But by the 14 Eliz. c. 11, s. 5, the 13 Eliz. c. 10, s. 2, was declared not to apply to lands of "parsons or vicars or any other having any spiritual or ecclesiastical living, situate in any city, borough, town corporate, or market town, or the suburbs of any of them," and enabled leases to be made of such lands, other than the capital dwelling-house, for a period of forty years.

It would appear that the ecclesiastics of Elizabeth's reign were not too scrupulous regarding the rights of their successors, and that they were not above evading the statutes regulating their power of leasing, by granting new leases before the old leases had expired, and the 18 Eliz. c. 11 was therefore enacted to make void leases of lands being in lease for more than three years then unexpired, and also avoided all bonds for renewing leases contrary to the true intent of that Act, or of the 13 Eliz. c. 10.

These old statutes relating to leases by ecclesiastical persons, though still unrepealed in England, have been there practically superseded by statutes passed in the reign of Her late Majesty Queen Victoria.

Simony, or the obtaining of ecclesiastical benefices for money or other benefits or profits, was also the subject of legislation, and by 31 Eliz. c. 10, s. 14, presentations so obtained were declared to be void—and the right of presentation in such case devolved to the Crown. How far such a statute is in force in Ontario is problematical. Regarding an advowson, however, as a right of property, its acquisition by means forbidden by this statute is a breach of the law by which a right of property is to be exercised by the patron, on the one hand, and acquired by the presentee, on the other. Possibly for the reasons given by Vankoughnet, C., any rights of the Crown under this statute would not now be exercised in this Province, even if they exist. The statute further provides that any person corruptly instituting a person into any benefice with cure of souls, is to forfeit double the value of one year's profits of such benefice, and that the institution is to be void, and the patron may present as if the person so instituted were dead, after the lapse of six months after notice has been given of such avoidance by the Ordinary to the patron. The same Act also imposes a penalty of double the amount for or in respect of which an incumbent corruptly resigns a living, these penalties being prescribed in addition to any punish-

ment prescribed by "the laws ecclesiastical." It also imposes a penalty of £40 for the corrupt ordination of any minister, and £10 on the person so ordained, and disqualifies the latter for seven years from taking any benefice, and declares, if he does, it shall be void, and enables the patron to present some other person.

One moiety of the penalties payable under this statute, is to go to the Crown and the other to the informer. How far such provisions are in force is somewhat doubtful; so far as they affect the right to exercise patronage, they indirectly affect a right of property, and, even though the penal clauses were inoperative, the other provisions of the statute might, nevertheless, be invoked by a patron seeking to exercise his rights thereunder.

While the statutes above referred to avoided the institution of persons as parsons where the same was obtained by simony, yet it was found necessary to give effect to bona fide leases made by such persons to lessees without notice of such simony: and this was accordingly done by 1 W. & M. c. 16.

7 Anne c. 18 is another Act for the protection of patrons, and provides that the usurpation of the right to present on any avoidance, is not to displace the estate or interest of the patron entitled to the advowson, who may sue for the enforcement of his right as if no such usurpation had taken place. This Act also makes provision in case of an advowson being owned by coparceners, joint tenants, or tenants in common.

By 5 Geo. III. c. 17 it is recited that doubts existed whether the statutes of Henry VIII. and Elizabeth already referred to gave Bishops and others power to make leases of tithes, tolls, or other incorporeal hereditaments, and therefore gave them the power to lease that class of property for three lives or twenty-one years.

From what has been said it is apparent that he who would delve into the law applicable to the Church of Eng-

land in Ontario, has a somewhat difficult task before him, and it might be deserving of the consideration of the authorities of that body whether it is not desirable that in place of much of the difficult and obscure legislation to which we have referred, it would not be well to invite the legislature to consolidate and revise the laws above referred to, so as to make them at once more accessible and more intelligible to those whose rights are governed thereby. Such a revision and consolidation would, no doubt, be required to be made at the expense of those who desire it.

MARRIAGE WITH DECEASED WIFE'S SISTER.

The passing by the House of Lords at the recent session of the bill legalizing marriage with the sister of a deceased wife has, in one sense, brought to an end a struggle which has been going on for two generations. The Commons have many times passed the bill, and the Lords many times rejected it. The pressure has been persistent, the reason probably being that there were many persons in a position to back up their claims who were desirous of having their marriages legalized. In fact there was a strong demand for the Act; and the answer to the question, why was not marriage with a deceased brother's widow also legalized? is that there was no demand for that. Whatever one may think, either from a social or a religious point of view, of the position of those who contract such marriages, it cannot be denied that the argument ab inconvenienti, derived from the fact that nearly all other countries, and nearly all British colonies, sanction them, is a strong one.

The bill, having been passed by both Houses and having received the Royal assent, is now the law; but the discussion is not by any means dead. In truth it is livelier than ever, but the question now concerns the attitude of the clergy of the Church of England in regard to solemnizing the marriages permitted by the Act, and the status as communicants of persons who have contracted such marriages.

The Bishop of London, who recently visited Canada, before leaving England addressed a letter to his clergy advising them not to celebrate such marriages nor allow them to be celebrated in their churches. Being interviewed on the subject in New York, he said that the House of Lords had added amendments giving the Church liberty to act according to its conscience, and that in any case the law of the Church was entirely distinct from that of the State. He said he had written to his clergy regarding the deceased

wife's sister bill because the measure had raised a real difficulty in the minds of many clergymen and laymen. Before the bill was passed no social questions had been raised by a deceased wife's sister living with her brother-in-law and taking care of his children. But, as soon as the State made it lawful for these to marry, it was thought by some improper for them to continue to live in the same house.

"I received several letters from widowers whose sisters-in-law were living with them, asking if they ought to send them away," said the Bishop, "and I told them, by no means. And I instructed my clergy not to solemnize marriages according to the bill, nor allow the use of their churches for such marriages. The House of Lords secured important amendments to the bill which allowed the clergy of the Church of England to do this. I took this stand for two reasons. First, because I thought the bill would work hardship to many families of the middle classes, and would be beneficial to only a few rich men who had been breaking the law before. And, second, because it has been the policy of the Church for several hundred years not to countenance such marriages."

Bishop Ingram remarked that there were two Bishops of the English Church who had lost their wives, and whose children were being cared for by their mother's sister, and that public opinion would never, he thought, discountenance these or any other sisters living with their brothers-in-law.

The reporter told the Bishop that the question had been raised in the United States of how it was possible for the law of the Church to contradict, and even supersede, the law of the land. In this particular instance, the Bishop said, amendments to the bill left the Church free to act as it liked.

"But," said Bishop Ingram, "if at any time the State should enact legislation for the Church which was against the conscience of the Church, we should dissolve partnership."

The other side of the controversy is moderately taken by the London Law Times, which says:—

"There must be many of our readers, being members of the Church of England, who will have followed with regret the recent developments in the controversy relating to the marriage of a deceased wife's sister. In these columns we have frequently deprecated in another connection the policy of 'passive resistance,' and shewn how inimical it is to all constitutional government. It appears as though some of the very authorities so vocal in their denunciations of this policy, when pursued against their interests, are now counselling a course of action which runs on similar lines. The optional clauses in the Act were inserted to meet the qualms of conscience amongst those clergy who felt themselves unable to accede to the new state of things, and they were passed with a plain undertaking that the Archbishop of Canterbury would do his best to smooth down difficulties. These verbal utterances seem strangely inconsonant with his printed advice and the counsel given by other somewhat hasty bishops. It is not within our province to discuss the rights and wrongs of this controversy, but it is quite open to us to deprecate yet again passive resistance, whatever may be its incentive. It is certainly, to put it at its lowest, impolitic in the long run, and calculated to bring the law into contempt, and can scarcely be approved on moral grounds by the majority of the clergy or laity. The prospect of an imperium in imperio has certain worldly terrors for the young parson. He may not entertain the convictions of his Bishop, and he may find himself in an unfavourable position when promotion is in the air. Parliament has now, wisely or unwisely, brought the law of this country into line with that of other lands where equal standards of social purity are observable in other directions. There are straightforward means of reversing this decision open to those who object to it, but while the Act remains it should be treated with loyalty. Meanwhile, the practical man of affairs may recall two or three matters in regard to which little seems

to have been written during the last few weeks. First, the agitation is to some extent being artificially created, and will subside as something more exciting turns up; and, secondly, it is only a small number of persons, after all said and done, who have a deceased wife's sister of a marriageable character; thirdly, our readers may ask themselves whether, amid the possible alternatives which present themselves in the case of persons in the lower classes of life whose ideas of sexual relationship are none too delicate, it is not better that the parties should marry than that they should bring into the world more illegitimate children to swell the number of those born under the unsatisfactory laws relating to persons of defective minds."

Commenting upon this deliverance, a valued contributor writes:—

"The Law Times deprecates the action of the Archbishop of Canterbury and other Bishops of the Church of England in reference to the recent statute removing the ban of illegality from marriages between men and their deceased wives' sisters. From a Canadian standpoint, and as citizens of a country where similar legislation exists, we are quite unable to understand the force of this objection. No one in Canada that we are aware of would find fault with any Bishop or clergyman for endeavouring to dissuade the clergy and people from availing themselves of the liberty which the Canadian statute affords them, or would consider such men as passive resisters or in any way whatever disloyal to the State. If the clergy believe that such marriages are contrary "to God's law," as indeed the British Parliament has itself affirmed (28 Hen. VIII. c. 7, s. 7 and 32 Hen. VIII. c. 38), then it is not only the right but the duty of the clergy to say so, and to dissuade by every means in their power people from entering into such unions. The Law Times would seem to suggest that the new law is a command to every one to marry his deceased wife's sister—whereas it is of course nothing of the kind. It simply removes certain

secular disabilities, and gives the woman the legal status of a wife and the issue the status of legitimate children.

"But no man or woman is required to avail himself of the benefits of such legislation. If the clergy believe that such unions, though now freed from the objection of secular illegality, are nevertheless contrary to the moral law of God, they would be utterly false to their duty if they neglected to say so.

"If the Parliament of Great Britain were to repeal all laws against larceny, the London Law Times would hardly contend that it was the duty of the clergy of the Church of England to teach people that it was right for them to steal."

RECENT CASES FROM THE TIMES LAW REPORTS.*

Contract.]—By the terms of the Act by which the Metropolitan Water Board took over the affairs and assets of the Southwark and Vauxhall Water Company, all contracts make by the company before the Act, and subsisting on the date of such taking over, might be enforced "as fully and effectually as if, instead of the company, the water board had been a party thereto." It was held in Edge v. Metropolitan Water Board, 23 T. L. R. 698, that a contract made by the company which was to be in force "during the continuance of the existence of the company," was not enforceable against the Metropolitan Water Board.

Crown.]—Attorney-General v. Duke of Richmond, 23 T. L. R. 742, decided that the general words "every actual tenant in tail" in s. 15 of the Fines and Recoveries Act (the equivalent of R. S. O. c. 122, s. 3), extend to the reversion of the Crown, and that the Crown's reversion may be barred, even though it is specially mentioned in the Acts creating the entail.

Estate Duty.]—It was held in Attorney-General v. Duke of Richmond, 23 T. L. R. 739, that the words "bona fide, for full consideration in money or money's worth," in s. 7, s.-s. 1 (a), of the Finance Act, 1894 (the equivalent of s. 3, s.-s. 4 (a), of our Succession Duty Amendment Act, 1905), referred to the nature of the transaction, and not to the motive therefor. Once it is found that the incumbrances are real, intended to have full operation, without any secret or covinous arrangement or reservation, it is immaterial that they were created for the purpose of evading estate duty, even though the incumbrances were in favour of the next heir.

Libel.]—The privilege given to reports of proceedings in the Courts is based on this, that, as all persons can not be

* Including cases in Vol. 23, Nos. 30 to 35, inclusive.

in Court, it is for the public benefit that they should be informed of what takes place, substantially as if they were present. But a newspaper must publish only what is true, and if papers publish that which is false, they do it at their peril. "The jury must look at the matter as men of common sense, knowing the difficulty of the reporters, in saying whether there was any gross carelessness in the report, and that the report was so unfair to the plaintiff that there could be no answer to his claim. If that were so, the defendants were liable:" Furniss v. Cambridge Daily News (Limited), 23 T. L. R. 704.

Marine Insurance.]—In Maritime Insurance Co. v. Alianza Insurance Co. of Santander, 23 T. L. R. 703, it was held that the word "place" in a policy insuring a vessel "whilst at a port or ports, place or places in New Caledonia," means some place at which the vessel had arrived for some purpose (e.g., for loading or for shelter), and not a place where the vessel might happen to be passing.

Money Paid in Mistake of Fact.] -Kleinwort Sons & Co. v. Dunlop Rubber Co., 23 T. L. R. 696, is an interesting case on the difference in law between the position of a principal to whom money has been paid under a mistake of fact and that of an agent in a like case. If the defendant has dealt as a principal with the person who paid him, he is in any case liable to refund the money. The liability of an agent to refund will depend upon whether he has paid over the money received to a principal, or has done something which has so prejudiced his position that it would be inequitable to require him to refund.

Probate Duty.]—Two partners residing in England carried on the business of sheep farming by their agent in New South Wales:—Held, that the share of the deceased partner was situated in the place where the business was carried on, and that probate duty was payable in New South Wales. Reference made to the "broad rule" enunciated in In the

Goods of Ewing, 6 P. D. 23, that the share of a deceased partner was situate where the business was carried on at the time of his death: Commissioners of Stamp Duties v. Dalting, 23 T. L. R. 723.

Promise to Marry on Death of Wife.]—In Wilson v. Carnly, 23 T. L. R. 757, 578, the point arose whether a promise made by a married man to a woman to marry her on the death of his wife, the woman knowing at that time that he was married, was not void, as being contrary to public policy. Lord Coleridge (Commissioner of Assize), in giving judgment, pointed out that the whole tendency of modern decisions is to scrutinize most closely any attempt to enlarge the class of contracts void as against public policy, and, in the absence of any direct authority on the point, refused to state as a bare proposition of law that such contracts were void, and gave judgment in favour of the woman for a breach of contract.

Property in Letters.]—The possessor of letters or original documents written by a deceased person is not entitled to publish them, or extracts from them, without authority given by the deceased person before his death, or without permission from his personal representative. It was held in Philip v. Pennell, 23 T. L. R. 718, that, in the absence of any special or confidential relation between the deceased and the holder of the letters, which would render the communication of their contents to third persons unlawful, such letters may be used for the purpose of getting information therefrom for a biography of the deceased.

Trade Name.]—The appellants, "The Dunlop Pneumatic Tyre Company," carried on business, using the name "'Dunlop" to designate goods manufactured by them, and that name was stamped on most of the goods so manufactured. These goods were principally tires, though other goods, accessories used in relation to and on motor cars and bicycles, were manufactured. The appellants did both a retail and

wholesale business, and had a large number of agencies all over the world. The respondents were a small company called "Dunlop Motor Company," formed for the purpose of selling on commission and repairing motors and motor cycles, and parts thereof. The business was carried on in Kilmarnock, and consisted chiefly in repairs to motor cars and the sale of petrol. It was held that there was no evidence to shew that the use of the word "Dunlop" by the respondents would mislead any one to think that the two companies were the same: Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co., 23 T. L. R. 717.

Trade Secrets.]—Summers & Co. v. Boyce and Kimond Co., 23 T. L. R. 724, decides that giving a list of the plaintiffs' customers and information as to the terms upon which the plaintiffs did business came within an agreement not to "divulge or make known any of the trusts, secrets, accounts, or dealings of or relating to the plaintiffs' business."

Will—Interlineation in.]—A testator in 1898 made his will, and in 1903 added thereto a codicil. In 1905 he stated in the presence of witnesses that he intended making certain alterations in his will, and then wrote in, between the last words of the codicil and his signature, words revoking certain legacies. The interlined words were partly above and partly at the side of his signature, but the attestation clause was below the signature. The testator immediately added another codicil to the will, writing it on the same page as the interlined words, and this second codicil was duly executed and attested:—Held, that the words interlined were part of the second codicil, and should be admitted to probate: In the Estate of Lunn, Oldroyd v. Harvey, 23 T. L. R. 728.

Will—Revocation of.]—A duly executed will last seen in the testator's possession, but not forthcoming at his death, is presumed in law to have been destroyed by the testator animo revocandi; but that presumption may be rebutted by

evidence of facts. A letter written by a testator after the execution of the will stating that he had cancelled the will is not evidence of an effective revocation, but is admissible to prove the state of mind and intention of the testator. In the case of In re Sykes, Drake v. Sykes, 23 T. L. R. 747, a letter stating that the testator had cancelled his will, and asking that a copy of it be sent to him for re-execution, was held by the Court of Appeal to be insufficient evidence to rebut the presumption of revocation. Vaughan Williams, L.J., dissenting, considered that the letter was ample evidence to rebut the presumption, and considered the case to come within Ibbott v. Bell, 34 Beav. 395.

THE LATEST ONTARIO DECISIONS.*

Cemetery.]—The certificates under which the plaintiffs in McMartin v. Chisholm, 10 O. W. R. 305, sought to restrain the defendants from proceeding with the enlargement of a church situated in a burial ground, so as to encroach upon a roadway 15 feet wide between the north wall of the church building and the plaintiffs' two burial plots, were not such as to convey any title to the soil, but created only a license or privilege of interment in the plot named. The Court of Appeal held that, the space mentioned never having been laid out as a roadway, the mere reference in the certificates to a map which indicated the wide space did not amount to a warranty or undertaking that it would be maintained; and, upon the evidence, that what was proposed to be done did not unreasonably interfere with the access of the plaintiffs to their respective plots.

Contract.]—An appeal by the plaintiffs in Deschenes Electric Co. v. Royal Trust Co. from the judgment of Anglin, J., 9 O. W. R. 517, noted ante 374, was dismissed by the Court of Appeal: 10 O. W. R. 311.——An appeal by the defendant was allowed by a Divisional Court in House v. Brown, 10 O. W. R. 396, an action for the price of a "House cold tire setter," from the judgment at the trial, because it appeared that the price was payable in instalments, and the times for certain deferred payments, which were to have been decided upon by the parties, had not been so decided upon.

Costs.]—Because the by-law in question in Re Cameron and United Townships of Hagarty, Sherwood, Jones, Richards, and Burns, 10 O. W. R. 357, being a by-law closing a road, required, before it should have any force, that it be confirmed by a by-law of the county council, which had

*Short notes of the most important cases in Volume X. of the Ontario Weekly Reporter, Nos. 9, 10, 11, 12, 13, 14, pp. 305 to 408, inclusive.

not been done, Riddell, J., decided that an application to quash such by-law was premature, and ruled that the applicant should have no costs of the application, but, as the municipality should not have passed the by-law, gave no costs against the applicant.——Rulings of Riddell, J., in Plenderleith v. Parsons, 10 O. W. R. 387, upon an appeal by the plaintiff and cross-appeal by the defendant from the taxation by the senior taxing officer at Toronto of the defendant's costs of an action for redemption, are: that, notwithstanding Re Robinson, 16 P. R. 423, there is no general rule against allowing the costs of extending the notes of the evidence taken by a Master upon a reference, at least where the evidence is not taken in long hand; that a proper charge may be allowed for the attendance by a solicitor upon inspection by the other side of documents produced by him under order, the English authorities not applying in this matter, as there is no item such as No. 90 in the English tariff; that a fee to counsel for advising on evidence may be allowed upon a hearing before the Master; that a charge for making copies of entries in the plaintiff's books was properly allowed under item No. 57 of the tariff, Brown v. Sewell, 16 Ch. D. 517, having no relevancy here; that a charge for going over the accounts with the plaintiff's solicitor to ascertain what could be agreed upon is proper under item No. 142; and that once a subpœna is used to bring witnesses who are required to be sworn at any sittings of the Court, a new subpoena must be procured to secure the attendance of witnesses upon a subsequent day. Many other points of more or less importance are dealt with.

Criminal Law.]—The applicant had been convicted by a magistrate and sentenced to 4 months' imprisonment, but, instead of committing him to gaol, the magistrate allowed him to go away. He was subsequently brought back and required to enter into a recognizance, and, upon his doing so, was sent away. Afterwards he was, under warrant of the magistrate, arrested and incarcerated in the Toronto gaol.

A motion for the prisoner's discharge on habeas corpus, made before the expiration of 4 months from the time of his sentence, was refused by Riddell, J., who reserved leave to move for a new writ after the 4 months had expired. Upon the return of such second writ it was decided by Riddell, J., that it had been rightfully granted upon the alteration of circumstances, though such writ should not be granted upon any ground which might have been taken upon the former application, and that the applicant could not be held guilty of an escape under R. S. C. c. 146, s. 185, so as to be liable to serve the balance of the term, the cause of his being at large not being, quoad him, unlawful, as there was no mens rea: Rex v. Robinson, 10 O. W. R. 338.

Crown.]—An appeal by the defendants E. C. Hargrove and the White Silver Mining Company in Attorney-General v. Hargrove from the judgment of Boyd, C., 8 O. W. R. 127, noted 26 C. L. T. 578, was dismissed by the Court of Appeal: 10 O. W. R. 319.

Division Courts.]—As a Division Court action was originally framed, certain persons were added as garnishees, against whom the action was, by reason of s. 190 of the Division Courts Act, R. S. O. 1897 c. 60, brought in the wrong Court. At the hearing the plaintiff abandoned all claim against the garnishees, who had disputed the jurisdiction, but the primary debtor, who had filed no dispute note, objected that the section named was imperative. Nevertheless, judgment was given in favour of the plaintiff. On motion for prohibition, Riddell, J., held that it was permissible for the Division Court Judge to obtain jurisdiction by making an amendment striking out the garnishees as parties. It was also decided, with respect to an objection that jurisdiction was ousted by s. 16 of the Saw Logs Driving Act, R. S. O. 1897 c. 143, that in ruling, as he did, that the facts established a right of action at common law, the Division Court Judge was within his rights: Re Boyd v. Sargeant, 10 O. W. R. 377.——In Re Buchanan v. Brown, 10 O. W. R. 393, the defendant, residing

at Seaforth, had disputed the jurisdiction of the 5th Division Court in the county of Oxford, and, judgment being given against him, made application for prohibition. In answer to the defendant's material, the plaintiff filed an affidavit setting forth that it was untrue that any of the transactions in question in the suit were arranged at the town of Seaforth; that the goods sued for were sold to the defendant on orders received by the plaintiff at his place of business at Ingersoll; that payments therefor were to be made at Ingersoll, where the goods were shipped to the defendant, and were so made. Accepting the plaintiff's affidavit, and in view of his conduct, taking it strictly, Riddell, J., considered that delivery of the goods, in the absence of some special agreement, would be outside the jurisdiction of the Oxford Court, and that proof of such delivery would be prima facie part of the plaintiff's case. Re Noble v. Cline, 18 O. R. 33, distinguished.

Extradition.]—In Re Bartels, 10 O. W. R. 379, while a motion by the prisoner, upon the return of a habeas corpus, for an order for his discharge from custody under a warrant for his extradition, was pending, he escaped from the custody of the sheriff. Riddell, J., retained the motion until such time as the prisoner might be found and proceeded against for the violation of Canadian law involved in his escape.

Husband and Wife.]—In Switzer v. Switzer, 10 O. W. R. 406, upon an appeal from an order granting the plaintiff interim alimony and costs, it was urged: (a) that a separation agreement entered into between the parties concluded the plaintiff, (b) that the plaintiff was guilty of adultery with a person named; and (c) that a decree of divorce had been obtained from a Court in North Dakota. Riddell, J., overruled the first objection, because the plaintiff alleged that the agreement was obtained by pressure and executed under fear of further ill-treatment; the second, because the plaintiff denied the adultery; and the third, because of

the manner in which the divorce had been obtained, the proceedings being commenced about a month after the defendant went to North Dakota, and the decree pronounced without personal service upon the wife and in her absence. Then, too, the defendant had been at the time the divorce was granted, and for some time before, in the county of Bruce visiting from time to time the woman with whom he afterwards went through the form of marriage.

Improvements.]—A motion by William John Coulter in Re Coulter, Coulter v. Coulter, 10 O. W. R. 342, for the payment out of Court to him of $1,598, alleged to have been expended by him in improvements upon certain lands, in the belief that he was the owner thereof in fee, whereas he was only a life tenant, was refused by Riddell, J., and the matter referred back to the Master, because the report of the latter shewed only that this sum had been expended for permanent improvements which the applicant claimed to have made in mistake of title upon the lands, instead of finding that the applicant had made lasting improvements on the land in question under the belief that it was his own, and the amount by which the value of the land was enhanced by such improvements It is suggested that the officials of the Court carefully adhere to the terminology of the statutes.

Local Option By-law.]—A Divisional Court in Re Duncan and Town of Midland reversed the judgment of Mulock, C.J., 9 O. W. R. 826, noted ante 442, holding that the council of a municipality may, if satisfied that a local option by-law has had a sufficient number of votes cast in its favour, pass the by-law without waiting for two weeks after the declaration of the clerk as to the result of the polling: 10 O. W. R. 345.

Master and Servant.]—The plaintiff in Frawley v. Hamilton Steamboat Co., 10 O. W. R. 308, had his foot cut off by a hawser or check line on the steamer "Macassa" as he

was placing the line over the timber heads to check the momentum of the vessel as she approached her dock. The mate, who was in charge of the operation, swore that he gave orders to have the line properly coiled, and, as his duty was, saw that it was done, and the passengers moved away. There was evidence, on the other hand, that the coil was greatly disarranged and lying about loosely, that no orders were given, and that nothing was done to get it into proper shape. The plaintiff testified that owing to the speed of the vessel he was thrown or dragged towards the timber heads, and his leg became entangled in the line with the result stated. The Court of Appeal held that the Workmen's Compensation Act applied to seamen, and that there was evidence to warrant the finding of the jury that the plaintiff's injury was caused by the negligence of the mate, to whose orders he was bound to conform and did conform.——In Wilson v. Davies, 10 O. W. R. 315, it appeared that the deceased, an employee of the defendants, while removing a block to start a car of bricks down a tramway, along which these cars moved by gravitation, stood on the west side of the car instead of the east, as he usually did, and was crushed between the car and a post to the west of it. It appeared that by reason of the proximity of this post, it was dangerous, as the deceased must have known, to stand on the west side while removing the block, while absolutely safe to stand on the east side, and no reason was disclosed why the deceased stood upon the west side. The Court of Appeal held that the deceased was guilty of negligence which was the cause of the accident.

Pleading.]—Upon an appeal from an order of the Master in Chambers striking out the counterclaim of the appellants, defendants, against certain other defendants, Riddell, J., in Armstrong v. Crawford, 10 O. W. R. 381, it appearing that all the matters requiring to be proved to establish the counterclaim would have to be tried before the plaintiff could have judgment, and that it was essential to

the success of the appellants' defence that the agreement and judgments, which, by the counterclaim, it was asked to set aside, should be set aside, and that in an action to set these aside the plaintiff would be a proper and necessary party, held that the counterclaim in question was proper, and should not have been set aside. Upon the question of convenience, it was the opinion of the Court that, were two actions brought, they would be consolidated, or, at all events, ordered to be tried together.

Promissory Note.]—At the time the action of Pure Colour Co. v. O'Sullivan, 10 O. W. R. 313, was commenced, the note sued upon was outstanding in the hands of third parties, though the plaintiffs were the holders and produced the note at the trial. It was urged for the plaintiffs that as sureties for the holders of the note they were entitled to bring the action to compel payment, but the Court of Appeal held that, since this case was not made on the pleadings, it was then too late for the plaintiffs to recover their lost ground.

Receiver.]—An application was made by one Clement in Re Diehl and Carrett, 10 O. W. R. 403, for leave to bring an action against receivers appointed by the Court, to assert his right as a bondholder of the Imperial Paper Mills of Canada, Limited, to prevent the receivers giving consent to a scheme by which debentures for a large amount to have priority over the bonds, were to be issued. Applying the principle that such leave will be given as of course, unless it is perfectly clear that there is no foundation for the claim, Riddell, J., granted the application, notwithstanding the refusal of Mr. Justice Swinfen Eady, in an action to which the applicant was not a party, of an injunction to another bondholder who sued in England to restrain the company and others from the action alluded to. Riddell, J., said: "The right claimed that a bare majority of creditors have it in their power to destroy the securities of the minority is an extraordinary one, and can only be obtained by the clearest of

arguments. I do not intend to be, and I think I am not, guilty of any want of respect for Mr. Justice Swinfen Eady when I say that I cannot find that it is perfectly clear that there is no foundation for the claim that Clement desires to advance."

Trusts and Trustees.]—In view of the facts that, so far as the assignments of mortgages in question in Logan v. Drew, 10 O. W. R. 334, were concerned, there was no question of fraud, or undue influence, or want of capacity on the part of the assignor, or want of legal advice, Britton J., held that the evidence that, at the time of the execution of these assignments (which were to his daughters) the assignor said to the solicitor who prepared them, "Make it clear that both are to be present when mortgages taken away," and that one of the assignees, then present, said, "You know, father, I am not asking this for myself—it is in the interest of the family," was not sufficient, in all the circumstances, to warrant such assignments being set aside, or to impress the same with a trust in favour of the plaintiff, a son of the assignor, who claimed under an assignment from his father.

Vendor and Purchaser.]—Toole v. Newton, 10 O. W. R. 322, was an action for specific performance. It appeared from the testimony of all parties that it was part of the agreement, and one of the terms on which it was signed, that it was not to be binding upon the defendant Newton, unless he could procure from one Mrs. Gore a release of her claim for dower for the sum of $100, or make title without her concurrence, and that the words "if in his power to do so" were written into the agreement for the purpose of expressing that understanding. The Court of Appeal varied the judgment of a Divisional Court so as to provide that if the defendants could not make a good title without the concurrence of Mrs. Gore, or could not procure such concurrence on payment of $100, then, if the plaintiff should not be willing to accept the title subject to Mrs. Gore's claim, with a deduction of $100 from the purchase price, the action

should be dismissed.——The situation which was the occasion of the action of Cummings v. Doel, 10 O. W. R. 331, was that the purchaser had received and registered her conveyance and paid a portion of her purchase money, but, while she had executed, refused to deliver, a mortgage to secure the balance, alleging that the vendor was guilty of a breach of his contract to complete the houses on the lands purchased. Britton, J., adjudged that the plaintiff was entitled to delivery of the mortgage in question subject to reduction by any sum that might be found due by the plaintiff in respect of the contract in question.——The plaintiff in McGuire v. Graham, 10 O. W. R. 370, not wishing his name to be mentioned in connection with the purchase, Hill, a clerk in the office of the agent of the vendor (defendant), inserted his name in the agreement, and when inquiry was made by the vendor as to who Hill was, the purchaser's agent replied that she need have no hesitation in signing the agreement, as he was a perfectly reliable person. The plaintiff's action for specific performance was dismissed by MacMahon, J., who held that the defendant was not bound by this agreement.

Warehouse Receipts.]—Toronto Cream and Butter Co. Limited v. Crown Bank of Canada, 10 O. W. R. 363, is distinguished from Halstead v. Bank of Hamilton, 27 O. R. 435, 24 A. R. 152, 28 S. C. R. 235, by Teetzel, J., because the evidence did not establish that the transaction of discounting a note for $6,000, as collateral security for which the warehouse receipts in question were given, and placing the proceeds thereof to the credit of the overdrawn account of the plaintiffs, was a mere form intended only to reduce the overdraft owing by them, or that there was any restriction against their drawing the same out in the ordinary course of business, and, therefore, it was held that the warehouse receipts in question were valid and binding. Their validity, it was also decided, might be supported by a letter asking for a credit of $10,000 to $12,000, and offering to

secure the same with warehouse receipts upon butter stored with certain companies named, for, while the warehouse receipts were not identified in it, and a different warehouse is named, it is "a written promise or agreement that such warehouse receipts would be given to the bank" within the meaning of the Bank Act, and when the plaintiffs assigned the receipts in question it was the intention of both parties to appropriate them to such written promise.

Will.]—Ellen Davies, having a vested interest in a fund to be created out of the sale of certain property by the executors of James Davies, including certain shares, but not an interest in possession, bequeathed all her property to Emma Davies, who possessed 10 shares of her own in the same company. By her will the latter bequeathed to her son Robert H. Davies all shares belonging to her, not to exceed 10 shares, and forming part of her estate, and other than those shares which would fall into her estate as "heir and devisee" (sic) of her daughter Ellen Davies, followed by a residuary devise of the residue of her estate, including the share of the daughter Ellen in the estate of James Davies. By a codicil she provided that all the stock in the company mentioned that should at the time of her death form part of her estate, should be first offered by her executors to the son at the price of $100 per share. It was decided by Riddell, J., that the son, instead of receiving the 10 shares free, was entitled to buy at par not only the shares standing in the name of Emma Davies, but also the proportionate part of the shares standing in the name of the executors of James Davies to which she was entitled: Davies v. Fox, 10 O. W. R. 361.——The validity of devises of real estate by a testator dying before the year 1892, to the Chapel Fund and the New Connexion Methodists, was in question in Re Youart, 10 O. W. R. 373. Riddell, J., considered Doe dem. Anderson v. Todd, 2 U. C. R. 82, to be conclusive against the validity of these gifts, unless there could be set up some legislation authorizing the New Connexion Methodists or the

Chapel Fund to take in mortmain. In 1874, by 38 V. c. 78 (O.), the Wesleyan Methodist Church of Canada, the Wesleyan Methodist Church of East British America, and the New Connexion, had their real and personal property vested in a new church, the Methodist Church of Canada, and, by s. 8, the provisions of 14 & 15 V. c. 142, entitling the Wesleyan Methodist Church to take in mortmain, were made to apply to the new church, as was done, in 1884, by 47 V. c. 88, when three other bodies came into the new church. These statutes not being retroactive, it was decided that they did not remove the objection to the gifts in question, which were held to lapse.

CASES FROM WESTERN CANADA.

Assessment and Taxes.]—A by-law of the town of Indian Head declared a certain building to be exempt "from general municipal taxation and from payment of said taxes" for 10 years. The full Court held, distinguishing the case from Canadian Pacific R. W. Co. v. City of Winnipeg, 30 S. C. R. 558, where the by-law in question declared certain property "free and exempt from all municipal taxes, rates, and levies and assessments of every nature and kind," that this exemption did not include school taxes; also that, as the school district comprised lands outside of the municipality, the latter had no power to exempt property from taxation for school purposes: Re Osment and Town of Indian Head (N.W.P.), 6 W. L. R. 114.

Attachment of Debts.]—The garnishee in Smith v. Van Buren (Man.). 6 W. L. R. 12, having entered into an agreement to purchase certain lands from the defendant, the price to be payable in instalments, disposed of his interest in the lands to one Thorlakson, who assumed the payments to fall due thereunder to the defendant. The plaintiff applied for an order that the garnishee pay over to him certain moneys to fall due under the agreement, when it was argued that there was, by reason of the garnishee having parted with her interest, no money due, owing, or accruing due, but Mathers, J., held that the garnishee, being still liable upon his covenant, could not escape liability unless the defendant had expressly agreed to relieve him therefrom. ——A point decided by the full Court in Woodley v. Harker (N.W.P.), 6 W. L. R. 102, is that a defendant is not a "person interested," within Rule 390 of the Judicature Ordinance, so as to entitle him to apply for an order to fix a time and place for summarily determining the question of the liability of a garnishee.——In Adolph v. Hilton (N.W.P.), 6

Short notes of the most important cases in Volume VI. of the Western Law Reporter, Nos. 1 and 2, pp. 1 to 308, inclusive.

W. L. R. 119, the full Court dismissed an appeal by a garnishee from the judgment of Wetmore, J., determining against the garnishee the question of his liability to the defendant, Scott, Prendergast, Harvey, and Johnstone, JJ., holding that there was no condition attached to the contract of the garnishee with the defendant, as alleged by the former, that a certain team purchased by him was not to be settled for until he was satisfied that the defendant had paid for it, and that, if there were such a condition, the same had been waived by the actions of the garnishee, and, at any rate, that the onus of proving non-compliance therewith was upon the garnishee, and that this onus had not been satisfied: while Sifton, C.J., and Stuart, J., were of opinion that, under s. 14 of the Sale of Goods Ordinance, there was an implied condition that the defendant had a right to sell the team in question, and that the evidence of the garnishee, establishing, as it did, that, while he was still in a position to return the team, he was made aware that it had not been paid for, and, upon inquiry, was informed by the defendant that one Duxbury was going to settle for "those things" by the 1st January, shifted the burden of proof upon the plaintiff to shew that the defendant had a good title, of which there was no evidence.

Certiorari.]—It is decided by the full Court in Rex v. Canadian Pacific R. W. Co. (N.W.P.), 6 W. L. R. 126, that it is not open to the Court, upon a motion to make absolute rules nisi for writs of certiorari, to review the evidence before the trial Court, and that, therefore, it was not competent for the Court to say that the justices in this case founded their decision on the view that the provisions of the Prairie Fires Ordinance respecting fireguards were valid and binding, in regard to a railway under Dominion jurisdiction, because, apart from the question of fireguards, there was still the general question of negligence.

Chattel Mortgage.]—Macdonald, J., in Dyck v. Graening (Man.), 6 W. L. R. 171, refused to give, at the instance

of the plaintiff, effect to objections to a chattel mortgage in favour of the defendants: (1) that the jurat in the affidavit of bona fides did not shew that the mortgagees were severally sworn (Moyer v. Davidson, 7 C. P. 521); (2) that the occupations of the mortgagees were not stated in such affidavit, they being sufficiently identified (Brodie v. Ruttan, 16 U. C. R. 210); (3) that the affidavit was not sworn to by the mortgagees, but affirmed; and (4) that the words "that I am duly authorized agent," which were inconsistent with the affidavit itself, were added.

Company.]—Section 123 of the Companies Act, which imposes a penalty upon extra-provincial companies carrying on business within the jurisdiction, without having registered under that section, is held by Hunter, C.J., in De Laval Separator Co. v. Walworth (B.C.), 6 W. L. R. 50, not to have the effect of rendering such contracts void.

Conspiracy.]—The words "to restrain or injure trade" in s.-s. (b) of s. 498 of the Criminal Code are decided by Phippen, J.A., in Rex v. Gage (Man.), 6 W. L. R. 19, a prosecution for conspiracy under that section, to include only such restraints as appear to be undue, and the question to be decided is held therefore to be "not whether the grain interests of the West, in their effort to carry on a legitimate business, have done anything which might be considered a trade restriction, but whether, regard being had to existing conditions, they have, to the undue public detriment, erected barriers to the fair, free, and natural competition of commerce." The most serious matter charged was that an agreement had been arrived at putting the grain business on a basis of a cent a bushel profit, neither more nor less, based on the price at Fort William, from the time of purchase, whether as "street" or "track" wheat, until sold to the miller or importer. The witnesses all agreed that this was the lowest profit at which the business could live, and it is pointed out that, were this rule abrogated, the result would be unsettled conditions, which, while temporarily profitable

to the wheat grower, would inevitably end in an erratic and unstable market, whereas, as conditions are, the Fort William prices are the highest the world's markets can justify, and these are the ruling prices, less necessary freight rates, storage and carrying charges, and less the one cent a bushel which the farmer actually receives for his grain. It was accordingly held, in the circumstances, that the regulations complained of involved no undue restraint.

Constitutional Law.]—Convictions under the Prairie Fires Ordinance were upheld by the full Court in Rex v. Canadian Pacific R. W. Co. (N.W.P.), 6 W. L. R. 126, notwithstanding that it was contended that the penalties imposed by such Ordinance do not apply to railway companies governed by the Dominion Railway Act, for the reasons that the subject matter of the legislation in question, not being a matter which it is essential shall be dealt with by Dominion railway legislation, is one in respect of which the provincial and Dominion jurisdictions overlap, and that the provisions of ss. 25 (e) and 239 of the Railway Act, 1903, do not supersede the Ordinance; and, no rules and regulations having been made thereunder by the Board of Railway Commissioners for Canada, the field was clear for provincial legislation.

Contract.]—The refusal of the defendants in Crowston v. Tate (N.W.P.), 6 W. L. R. 70, to convey to the plaintiff their saw mill and timber limit under an agreement between the parties, on the ground that the price had not been fully paid, was held by the full Court not to entitle the plaintiff to treat the agreement as terminated, in the absence of anything to lead to the conclusion that the defendants evinced a desire to abandon the contract, or that they had refused to be bound by it.——The plaintiff had entered into an agreement with the defendants under which he sold to the defendants his interest in a mining claim for a sum to be realized out of the working of the claim. The defendants failed to pay the sum in question, and sold the claim to third parties, where-

upon the plaintiff sued for the sum agreed upon. Craig, J., held that the plaintiff had an equitable lien upon the claim for this sum, and, the defendants having by the re-sale put it out of their power to carry out the agreement, the plaintiff was entitled to succeed: McDonald v. Winaud (Y. T.), 6 W. L. R. 151.——The omission by the plaintiffs, who sued for the price of a steam heating plant installed by them, to put in floor and ceiling plates, worth 10 cents a piece, around the pipes, was held by Dubuc, C.J., in Adams v. McGreevy (Man.), 6 W. L. R. 188, to be so trifling as to bring the case within Lucas v. Godwin, 3 Bing. N. C. at p. 744, and Stavers v. Curling, 3 Scott 755, and not to be such as should prevail to make the plaintiffs lose the whole consideration of an otherwise performed contract by such trifling omission.

Costs.]—The plaintiffs in Andrews v. Moodie (Man.), 6 W. L. R. 185, claimed from the defendant the sum of $50, being the amount of their costs in a suit for alimony against the defendant, in which they acted for the defendant's wife, and which, as one of the terms of a settlement between the husband and wife, the defendant agreed to pay. Perdue, J.A., held that, while the plaintiffs could not recover in the form in which they claimed, because they were not parties to the contract, the arrangement might be viewed as one by which the husband agreed to pay the wife's costs directly to the solicitor, pursuant to her direction, in consideration of the settlement of the alimony action, and this would amount to an equitable assignment.

Criminal Law.]—It was decided by Stuart, J., in Rex v. Standard Soap Co. (N. W. P.), 6 W. L. R. 64, that a bill of indictment could not be preferred before any Court under s. 236 of the Criminal Code except before a grand jury as part of the Court, and that, as there is no grand jury in the provinces of Saskatchewan and Alberta, there was no authority to make an order that a charge be preferred under that section; but, upon a Crown case reserved, the full Court

held that, since by the Saskatchewan and Alberta Acts all laws existing immediately before the coming into force of those Acts should continue in the provinces as if those Acts had not been passed, the repeal of c. 50, R. S. C. 1886, s. 65, by R. S. C. 1906, could have no effect upon the laws of these provinces, and that the indictment should therefore have been upheld.——A saloon with billiard room and theatre attached, and licensed under the Liquor Ordinance of the Yukon Territory, is held by Dugas, J., in Rex v. Kearney and Denning (Y. T.), 6 W. L. R. 140, to be a "public place" within the meaning of s. 204 of the Criminal Code, as amended by the Act of 1894.

Estoppel.]—The defendant, having taken from the plaintiff a mortgage for the full amount of the purchase money owing by the latter in respect of a purchase of certain lands from the defendant, was held by Johnstone, J., to be estopped from setting up as a defence to an action by the plaintiff for the amount owing by him for certain threshing, an alleged agreement that this amount should be credited upon the purchase money: Reading v. Coe (N. W. P.), 6 W. L. R. 279.

Evidence.]—Persons possessed of nautical skill will not be allowed to give in evidence, in an action for damages resulting from a collision, their views upon the manœuvres of vessels and the proper action to have been taken by them in order to avoid such collision. The Court, having called to its assistance assessors for that purpose, relies upon them for guidance in that respect. Ruling of Martin, J., in Bryce v. Canadian Pacific R. W. Co. (B. C.), 6 W. L. R. 53.

Execution.]—It is decided by Wetmore, J., in John Abell Engine and Machine Works Co. v. Scott (N.W.P.), 6 W. L. R. 272, that the word "homestead" in s. 9 of the Exemptions Ordinance means the house and adjacent land occupied as a home, and does not extend to lands which have been rented and are not and have not been occupied by the debtor or

his family for a considerable time and to which they have no intention of returning, but that the meaning of the word is not limited to what constitutes a homestead under the Dominion Lands Act (R. S. C. c. 54). It is also decided that the provisions of Rule 364 of the Judicature Ordinance, as to notice and advertisement of the sale of lands under execution, are not only imperative but prohibitive, in that unless complied with the sheriff shall not sell; but, in the circumstances of this case, the advertisement having duly appeared in all the weekly issues of the newspaper nearest published, except on two occasions when no issue was published, this was held to be a substantial (and sufficient) compliance with the Rule.

Executors and Administrators.]—The plaintiff, after the death of the defendant's wife, at the instance of the defendant then in England, took charge of a farm, part of her estate, and managed it for some months. The defendant came to Manitoba later and took out letters of administration to his deceased wife's estate and assumed the management of the farm, and a few months afterwards the plaintiff ceased to work thereon. An action for the value of the plaintiff's work, brought against the defendant as administrator, was dismissed by the Court of Appeal, on the ground that an executor can charge the estate in respect of a contract made by himself, only where the consideration for his promise was some contract or transaction with the testator. In respect of all other contracts, the executor must be sued in his personal capacity: Dean v. Lehberg (Man.), 6 W. L. R. 214

Forged Cheque.]—An appeal by the plaintiffs from the judgment of Dubuc, C.J., in Union Bank of Canada v. Dominion Bank (Man.), 4 W. L. R. 407, noted ante 63, was allowed by the Court of Appeal, who distinguished the case from that of Rex v. Bank of Montreal, 11 O. L. R. 595, 7 O. W. R. 638, 26 C. L. T. 405, on the ground that here there was no forgery of the signature of the drawer of the cheque. It is laid down as the duty of the bank upon which a cheque

is drawn to "determine whether they are satisfied to accept the maker's signature as the genuine and proper signature of their customer, if they are in funds to meet the demand, but they do this ordinarily upon the implied representation from the person presenting that he is in fact the lawful holder and that it is a cheque for the amount shewn on its face:" 6 W. L. R. 217.

Gift.]—The plaintiff's father had purchased and given to her a piano which, until the plaintiff's marriage, remained in the house occupied by them in common, and was generally known as hers, in which respect it differed from the other furniture in the house. The Court of Appeal held that the plaintiff, being in actual possession and assenting to the gift, became thereupon fully possessed in her own right so as to create a valid gift, notwithstanding the absence of a deed: Tellier v. Dujardin (Man.), 6 W. L. R. 1.

Highway.]—The judgment of Richards, J.A., in Mitchell v. City of Winnipeg (Man.), 6 W. L. R. 31, involved an application of the rule of law that where an owner excavates his land to the street line, a duty is cast upon him to protect the public, using the street, against injuries resulting from the excavation, and he is liable none the less for injuries resulting from the work itself because he has employed an independent contractor to do such work. The circumstances were, that a bicyclist, coming down a grade, finding his wheel beyond his control by reason of the chain coming off, and the street blocked ahead of him by passing teams, turned into a lane only to find the latter also blocked, with the result that he ran his wheel into, or was forced, by his inability to turn quickly enough owing to the impetus he had gained, into the excavation, of which he was unaware, receiving injuries for which he sued.

Husband and Wife.]—A business was carried on in the name of the claimant in Douglas v. Fraser (Man.), 6 W. L. R. 244, which was admittedly not carried on separately from

her husband. Assets of the business were seized under an execution against the husband, and the question in issue was whether the execution creditor could retain these as against the wife. A small part of the moneys with which the business was commenced were the wife's, but the larger portion was made up of the proceeds of a sale of land which the husband had given to the wife at a time when his financial position was such as to warrant his making this gift, and of rentals from this land which had been accumulated. Notwithstanding Shuttleworth v. McGillivray, 5 O. L. R. 536. 2 O. W. R. 250, Mathers, J., held that under R. S. M. 1892 c. 95, s. 2, the wife's right to this property was subject to the husband's common law rights therein. It was also decided that the words "any real or personal property, of any kind and description, of a married woman," in s.-s. (h) of s. 2 of the Married Women's Property Act, are limited or controlled by the subsequent words; that "money and property gained or acquired" refer to her profits in trade, whereas "wages and earnings" are confined to her personal earnings; and that, although the stock in trade was purchased in her name and would be hers unless the contrary were shewn, the facts that it comprised accumulations of profits which belonged to the husband, and that in fact the stock was purchased with his money, though in her name, and that he managed the business—under guise of a power of attorney, it is true—with as large discretionary power as if it was his own, led to the irresistible conclusion that the business was not one carried on by her at all, but by the husband in her name.

Judgment.]—While the action of Siemer v. Johanson (Y.T.), 6 W. L. R. 156, was pending, and before trial, the defendant left the Yukon Territory and went to the United States. His solicitor, having entered into a partnership with the plaintiff's then solicitor, wrote to the defendant, informing him that he could not act for him further in the case, and would hand the papers over to a responsible solicitor, who would communicate with him. The defendant received

this letter, but did not receive other letters written him by his original solicitor and the solicitor to whom the former had handed over the papers. Judgment for the plaintiff was given on the 17th July, 1906, the defendant not appearing at the trial. The defendant became aware of the judgment in the following January, and promptly moved to set it aside. Macaulay, J., refused the application, holding that the defendant had been guilty of such gross negligence as to preclude the exercise of the discretion given by the Rules in his favour, but set aside the proceedings taken upon a reference under the judgment, because the defendant had not been notified thereof.

Judgment Debtor.]—It is decided by the full Court in Jackson v. Drake, Jackson, and Helmcken (B.C.), 6 W. L. R. 44, in dismissing an appeal from the order of Irving, J., under s. 19 of the Arrest and Imprisonment for Debt Act, requiring the debtor to attend and answer questions, that that section is not repealed by Rule 610, since the procedure under the Rule is not inconsistent with or repugnant to that under the section, but alternative, and that both ought to be regarded as enabling and not as antagonistic to each other. The latitude allowed the examiner under either is very wide.

Jury.]—In Brindamour v. Robert and Robert v. Brindamour (Y.T.), 6 W. L. R. 148, Brindamour had failed to demand a jury in either case as and when prescribed by Rule 168. Craig, J., upon an application for the trial of both actions by a jury, deeming them actions eminently proper to be tried by a jury, directed that they should be so tried, holding that, while the Rule would in terms prevent a litigant securing a jury trial after the proper time had passed, s.-s. 2 of s. 88 of the North-West Territories Act, being broader than the Rule, would confer upon the Court a discretion to order a trial by jury.

Landlord and Tenant.]—The full Court affirmed the judgment of Newlands, J., in Dundas v. Osment (N.W.P.), 4

W. L. R. 116, noted 26 C. L. T. 646, with a variation, however, as to the amount to be recovered by the plaintiff: 6 W. L. R. 86.——The judgment of Newlands, J., in Tucker v. Armour (N.W.P.), 5 W. L. R. 35, noted ante 118, was also affirmed by the full Court: 6 W. L. R. 93.

Lien Notes Act.]—An appeal by the plaintiff from the judgment of Mathers, J., in Smith v. American-Abell Engine and Thresher Co. (Man.), 5 W. L. R. 329, noted ante 392, was dismissed by the Court of Appeal: 6 W. L. R. 179.

Master and Servant.]—The plaintiff in Mousseau v. Tone (N.W.P.), 6 W. L. R. 117, was hired by the defendant as a farm labourer for 8 months, at $25 per month, payable monthly. He worked for 6 months, and then wrongfully quitted the defendant's service. The full Court reversed the judgment of Newlands, J., dismissing the plaintiff's action to recover for the time he worked, and ordered a new trial, holding that as each month's wages became due an action lay therefor, and the only remedy of the defendant would be a counterclaim or cross-action for damages.

Mechanics' Liens.]—The last work done by the plaintiffs in Adams v. McGreevy (Man.), 6 W. L. R. 188, upon a contract for installing a steam heating plant, in respect of which for an alleged balance they claimed a mechanics' lien, was done on the 22nd February, and the action was brought on the 21st March of the same year. This work consisted in the bronzing of certain pipes and radiators. The plaintiff stated that the bronzing was no part of the contract, and that he did this as extra work, outside the contract; and that in ordinary contracts of this kind bronzing is not part of the contract unless specified, and it was not specified here. The last work previous to this was done on the 9th January. Dubuc, C.J., held that the contract had been completed more than 30 days before an action brought, and that the plaintiffs had lost their right to a lien.

Municipal Corporations.]—A judgment in favour of the defendant in Watt v. Drysdale (Man.), 6 W. L. R. 234, an action for injury to the plaintiff's crop by the defendant's cattle, was set aside on appeal by Howell, C.J.A., who held that, since the by-law in question, which imposed a duty on the plaintiff to fence, was not a by-law permitting the defendant's cattle to run at large, the common law right of the plaintiff to protection from wandering cattle must prevail. A provision in the by-law that in case of any trespass no action might be brought unless the owner of the property trespassed upon had complied with the provisions of the by-law, was held beyond the powers of the municipality to pass. The only power which the municipality possessed at the time to pass a by-law was under R. S. M. 1892 c. 100, s. 601 (e); s. 597 (d) and (e), and c. 12 of the same R. S. M., ss. (4), (5), and (6). These enactments only authorize the passing of by-laws allowing, restraining, and regulating the running at large, or trespassing of any animals, etc., and the regulating and declaring what a lawful fence shall be, etc.——For reasons stated in a long and carefully considered judgment in Robertson v. Town of High River (N.W.P.), 6 W. L. R. 281, Stuart, J., reaches the conclusion that the plaintiff is not entitled to restrain the defendants from filling up an irrigation ditch dug by one Robertson, of whose estate the plaintiff is the executrix, along what, since the summer of 1906, have been streets of the town. An authorization of the Minister of the Interior, evidenced by a letter of the Deputy Minister dated the 27th December, 1897, to the plaintiff, to construct these works, was conditioned upon the acquirement by the plaintiff of a right of way therefor, and this, so far as the land subsequently forming these streets is concerned, had not been arranged either with the then owners of the fee or those purchasing lots shewn on the registered plan on which these streets are laid out. A permission by Mr. Dennis for the Commissioner of Public Works for the North-West Territories on the 7th March, 1898, only granted leave to cross road allowances and public highways at points shewn on the plans

filed, and was held not to extend to the streets in question, which were then neither road allowances nor public highways. On the 3rd June, 1904, when these streets had, by public acceptance and user, evidenced by the overseer and ratepayers of the then village of High River taxing themselves and spending money upon them, become public highways, the Commissioner of Public Works issued an authorization to construct and maintain these works along the streets and lanes of High River, upon the conditions, among others, that the water should be piped or flumed along or across such streets. It is decided that under ss. 7, 12. 13, and 28 of c. 4 of the Ordinances for 1901, the Commissioner had power to grant such authority, and also, however, power to impose such conditions as he thought proper to protect the interests of the public. The condition mentioned not having been complied with by the plaintiff, he is held to have forfeited his rights under such license or authority.

Negligence.]—McGillivray v. City of Moose Jaw (N.W. P.,) 6 W. L. R. 108, was an action for damages for the death of a horse belonging to the plaintiff and for injury to another horse and waggon and harness of the plaintiff, occasioned by the horses mentioned falling into a trench being excavated in connection with a sewer by a contractor at the instance of the defendants, while the outfit was being driven along a street by persons by whom they were hired from the plaintiff. Points upon which the decision of the full Court in favour of the plaintiff was based were, that "when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor," and that " if a municipal authority is required to do work of a certain character, say, for instance, to keep highways in re-

pair, and does not do it, it would be nonfeasance, but if it does attempt to do it, as in this case, and in so doing does the work negligently so that damage is caused by such negligence, it would be misfeasance." By Stuart, J., it was decided that there was contributory negligence on the part of the driver of the waggon, but that, in the circumstances, this was not to be imputed to the plaintiff.

Particulars.]—It is laid down by Mathers, J., in Rat Portage Lumber Co. v. Equity Fire Insurance Co. (Man.), 6 W. L. R. 3, that to justify an order for particulars after the close of the pleadings, the well-settled practice is that it must be shewn by affidavit, or otherwise, that they are necessary for the purpose of saving expense or preventing surprise at the trial, and that such an order should not be made as of course.

Parties.]—In Levi v. Phœnix Insurance Co. of Brooklyn (Man.), 6 W. L. R. 17, where the plaintiff sued two insurance companies under two separate insurance policies, for loss occasioned by a fire, Mathers, J., following Hinds v. Town of Barrie, 6 O. L. R. 656, varied an order of the Referee by which the plaintiff was directed to elect against which of the defendants he would proceed, upon which the action should be dismissed against the other, so as to provide that the plaintiff should elect within five days against which defendant he would proceed, and should then discontinue against the other, or that the name of the other should be stricken out of the proceedings.——The action of Daniels v. Dickson (Man.), 6 W. L. R. 165, was upon a promissory note made by the defendants in favour of H., and by him indorsed to the plaintiff, and the main defence was that H. obtained the note by fraud, and that the plaintiff was not a holder in due course. Cumberland, Loc. J., set aside a third party notice at the instance of H., holding that the third party procedure was wholly inapplicable to a case such as this, and that, at any rate, it was not a case for the exer-

cise of the discretion of the Court to allow it; and also refused to order that H. be added as a party defendant, because of possible prejudice to the plaintiff. On appeal, Mathers, J., refused to interfere with the discretion exercised by the local Judge without expressing any opinion as to the power of the Court to make the order asked for.

Partnership.]—An appeal by the plaintiffs from the judgment of Phippen, J.A., in Slingsby Manufacturing Co. v. Geller (Man.), 5 W. L. R. 128, noted ante 200, was allowed by the Court of Appeal for the reason that, while, by non-compliance with ss. 69 and 72 of the Partnership Act, no special partnership was created, it was, nevertheless, the intention of Rosenthal to enter into some kind of partnership, and to share the profits of the business, and the rule at common law must prevail and he must be considered a general partner, for otherwise he would be a creditor and able to avail himself of his own neglect. So far as the intentions of Rosenthal affected the question, it was pointed out that what he did intend was not to incur the liability of a partner and not become a partner: 6 W. L. R. 223.

Physicians and Surgeons.]—The decision of the full Court allowing an appeal in Re Hanington (B.C.), 6 W. L. R. 37, from an order of Morrison, J., allowing an appeal to him from the decision of the Council of the College of Physicians and Surgeons of British Columbia, refusing to erase the appellant's name from the medical register, and directing that his name be erased on account of unprofessional conduct, is to the effect that "where the proceedings appear to have been fairly and impartially conducted, and the defendant has been given due opportunity to make his defence, and it is not shewn that the committee or the council has omitted to take something into account which should have influenced their deliberations, or have been influenced by some consideration which ought not to have influenced them, then the conclusion of the board ought to be treated with the same respect as the finding of a jury."

Principal and Surety.]—The plaintiffs in London Guarantee and Accident Co. v. Cornish (Man.), 6 W. L. R. 5, had been sureties for one Cornish, municipal treasurer of Brokenhead, but had cancelled their contract of suretyship under a clause in the bond enabling them to do so. They were requested to renew their contract, and agreed to do so upon being indemnified by third parties against their liability upon the new bond. The bond given by the third parties provided that if the treasurer and the third parties should make good to the company any sums which the latter might pay to the employer under their guarantee and any renewal or renewals thereof, the obligation should be void. It developed that the treasurer had, prior to the termination of the first contract of suretyship of the plaintiffs, misappropriated funds of the municipality to an amount exceeding $3,000, and the plaintiffs, having paid the amount of their bond, sued to recover upon the counter-security bond against the defendants. Mathers, J., dismissed the action, holding that, in the circumstances, the defendants were not liable for the misappropriation of funds prior to the date of the bond given by them, since it was the plaintiff's liability under their new bond that they were to be indemnified against.

Public Schools.]—An appeal by the plaintiff from the judgment of Newlands, J., in Clipsham v. Grand Prairie School District No. 833 (N.W.P.), 3 W. L. R. 313, noted 26 C. L. T. 431, was allowed by the full Court, on the ground that the Commissioner of Education, having adjudicated upon the right of the board to dismiss the plaintiff, and given notice of his decision to the parties concerned, could not thereafter deal with the matter in a manner wholly repugnant to and in reversal of such decision: 6 W. L. R. 95.

Railway.]—To establish a case of negligence on the part of a railway company in approaching a crossing in a city or town without blowing the whistle or ringing the bell, it is decided by Dubuc, C.J., in Pedlar v. Canadian Northern

R. W. Co. (Man.), 6 W. L. R. 201, that it is necessary that the plaintiff allege and prove that there is no by-law prohibiting the same.

Ship.]—The plaintiffs' vessel the "Chehalis" was being overtaken by the defendants' vessel the "Princess Victoria" in a narrow channel. By a sudden alteration of the course of the former, the collision in rspeect of which the plaintiffs sued resulted, although the "Princess," which was proceeding at a moderate rate of speed, was immediately stopped and reversed. Martin, J., found that the collision would not have occurred had the "Chehalis" continued on her course, as her duty was under article 21 of the collision regulations, and as she probably would have done had a proper look-out been maintained astern, a precaution required by good seamanship as well as by article 29. The rule (articles 23 and 24) requiring an overtaking vessel to "keep out of the way" not being an absolute direction, which would not be satisfied by an unsuccessful attempt to do so (The "Saragossa," 7 Asp. M. C. 289), all that was required of the "Princess" was reasonable care and skill, which, in the circumstances, was held to have been exercised: Bryce v. Canadian Pacific R. W. Co. (B. C.), 6 W. L. R. 53.

Street Railways.]—The plaintiff in Black v. Winnipeg Electric R. W. Co. (Man.), 6 W. L. R. 238, sought an injunction to restrain the street railway company from proceeding with the laying of a loop line for their railway on certain streets, on the ground that the consent of the city council under s. 2 of by-law 543, validated by 55 V. c. 56. had not been obtained. Mathers, J., in refusing a motion to continue an interim injunction, held, on the authority of City of Toronto v. Toronto R. W. Co., 12 O. L. R. 534, 8 O. W. R. 179, noted 26 C. L. T. 589, that such consent might be by resolution of the council as well as by by-law, and that it made no difference whether the matter originated in council on substantive motion or upon the adoption of a report of the board of contral or other body; that it was

immaterial that the scheme as shewn on the plan submitted to and assented to by the city engineer differed in details (a switch being left out) from that to which the council had consented, the matter of details being, by s. 2 (a) of the by-law, left to the decision of the engineer; and that, although the council had given the consent in question on condition that a certain other loop be constructed, there was nothing to shew that the construction of such other loop was a condition precedent.

Vacation.]—The decision of the full Court in Thompson v. Sparling (Y.T.), 6 W. L. R. 143, is that in calculating the time allowed for giving notice of an appeal from an interlocutory order to the Court en banc (15 days) vacation is not excluded. As to proceedings before that Court, except its sittings, there is no vacation.

Vendor and Purchaser.]—An appeal by the plaintiffs from the judgment of Newlands, J., in Blackstock v. Williams (N. W.P.), 5 W. L. R. 85, noted ante 202, was dismissed by the full Court: 6 W. L. R. 79.——The plaintiff in Shaw v. Bailey (Man.), 6 W. L. R. 197, sued for specific performance of an unregistered agreement for the purchase of land. A few days after this agreement had been entered into, the vendor made a deed of this land to one Bailey. Bailey had been informed by the plaintiff's solicitor that the land had been sold to the plaintiff, but he was informed by a real estate agent that it was not sold, and that the latter had it in his hands for sale, and the vendor himself informed him that it was not sold, and upon a search it was found that no instrument was registered, whereupon Bailey completed his purchase. It was held by Dubuc, C.J., that there was not such wilful abstinence from inquiry and fraudulent determination not to be informed shewn as would entitle the plaintiff to succeed in the face of the provisions of s. 91 of the Real Property Act.——In Heath v. Sanford (Man.), 6 W. L. R. 203, it appeared that the plaintiff had sought to procure an option to purchase certain land from the defend-

ant. The latter said that her husband would have to be consulted and that the plaintiff might see him, and the plaintiff thereupon saw the husband and prevailed upon him to sign the desired option. Dubuc, C.J., dismissed an action for specific performance, holding that this was not sufficient authority to the husband to sign the agreement.——The defendant in Irish v. McKenzie (Man.), 6 W. L. R. 209, owned lands within half a mile of lands bought, as was supposed, for the Transcontinental Railway shops at $125 per acre, and, believing that these shops would be located in his vicinity, had listed his lands with an estate agent at Winnipeg at $100 per acre. The plaintiff, becoming aware that the shops had been definitely located in the vicinity of the defendant's lands, drove out to the defendant's place and procured him, on payment of $3, to give him a 2 months' option upon his lands at $45 per acre, which he afterwards accepted. The defendant and his wife swore that the plaintiff had stated to them that the shops would be located on the other side of the city of Winnipeg, but the defendant denied that the subject of the location of the shops was ever mentioned. Mathers, J., accepted the defendant's evidence on this point, and refused specific performance of the agreement.——The agreement for purchase by the plaintiff of a half section of land provided that the plaintiff was to have possession "immediately after the execution of the agreement," and in another clause that the plaintiff should have "possession to fall-plough as soon as the crop was off." The receipt for the first payment of purchase money contained a statement that the plaintiff should have "possession according to the existing lease in the fall of 1906." The plaintiff, having made purchases and preparations looking to the carrying on of fall ploughing, demanded possession, when it was found that a tenant under a three year lease was in possession, and that this lease could only be terminated on 6 months' notice, whereupon the plaintiff repudiated the agreement and brought action for its cancellation and to recover back the money paid and for damages.

Mathers, J., held that, by reason of the representation as to the terms of the lease, the plaintiff was absolved from further inquiry as to its contents, and that he was, under the agreement, entitled to possession as soon as the crop was off, and not later than the 1st October; and, the right of the tenant not having been extinguished, was justified in rescinding the agreement and demanding his money back; but that he was not entitled to the damages claimed, as it was not shewn that the defendant was aware of the preparations mentioned: Cairns v. Dunkin (Man.), 6 W. L. R. 256.——

In re Babbitt and Boileau (N.W.P.), 6 W. L. R. 260, it appeared that Babbitt, becoming aware that Boileau was willing to sell a quarter section of land at a certain price, procured one Houghton to purchase it, and secured from Houghton payment of a deposit of $200 and gave him a receipt therefor, setting out that this sum was a deposit on such quarter section and the terms of sale, and at the same time paid to Boileau $200 and secured a similar receipt from him, in which the price was stated to be several hundred dollars less than Houghton was paying. There was nothing in the receipts to shew that Babbitt was understood by Boileau to be the purchaser, and the latter asserted that he supposed he was selling to Houghton. This view was supported by the fact that in stating his price to Babbitt he allowed for the latter's commission, which had been discussed between them. In the circumstances, Stuart, J., held that Boileau had never agreed to sell this land to Babbitt, and ordered the removal of a caveat filed by the latter.

DECISIONS FROM THE COURTS OF QUEBEC AND THE MARITIME PROVINCES.*

Company.]—Lynch v. William Richards Co. (N.B.) 3 E. L. R. 383. was an action to recover tolls due by the defendants for driving their timber for the seasons of 1904 and 1905, under an arrangement made by the plaintiff with two incorporated driving companies, with the knowledge and consent of the defendants, as alleged. Resolutions were passed by the directors of the companies authorizing the plaintiff to carry on the driving operations of the companies and recive for his services the tolls as fixed by law. The companies were incorporated by Acts of the New Brunswick legislature. They were given the right to use the waters of a navigable river for the purposes of driving lumber, to the exclusion of all others. They were authorized to interfere with the navigation of the river by the erection of piers, booms, and other obstructions, and to expropriate private lands. They were under an obligation to do the work, at a specified price, which the owners were bound to pay. The majority of the full Court held that the contract of the companies with the plaintiff was beyond their powers. Barker, J., said that "the substance and effect of the transaction was to substitute the plaintiff in the place of the company, and to put their property and their powers out of their control and into the control of the plaintiff, and he was to discharge the company's duty. It seems quite beside the question to say that the public interest did not suffer. The question is, was this a contract which it was competent for the companies to make? I think it was not."———The point discussed in Indian and General Investment Trust Limited v. Union Bank of Halifax (N. S.), 3 E. L. R. 409, is an interesting one. The Acadia Pulp Co. executed a

* Short notes of the most important cases in Volume III. of the Eastern Law Reporter, Nos. 7 and 8, pp. 297 to 424, inclusive.

trust deed in favour of the plaintiffs to secure debentures, which, after conveying land, contained a clause charging in favour of the trustees (the plaintiffs) all the assets of the company "with the payment of all moneys for the time being owing on the security of these presents, and such charge shall rank as a floating charge, and shall accordingly in no way hinder the company from selling, alienating, leasing, paying dividends out of profits, or otherwise disposing of or dealing with such assets in the ordinary course of its business, and for the purpose of carrying out the same, but the company shall not be entitled to mortgage or charge the same in priority to or pari passu with the security hereby constituted." The company obtained a loan from the defendants upon securities under the Bank Act, s. 74, given upon the company's wood at different places. The defendants took possession of the wood covered by the securities, and this action was brought to determine the right to the proceeds. It was held by Graham, E.J., that but for the restriction in the clause in question, the security of the defendants would have had priority over that held by the plaintiffs. The money was obtained from the defendants for the purpose of carrying on the pulp company's business, and that is permitted by the very definition of a floating charge. And to make the restriction effective, actual notice thereof to the defendants must be shewn. The question, therefore, was, whether they had actual notice of the clause, and it was held, upon the evidence, that they had not, and that the defendants were entitled to succeed.

Criminal Law.]—A new trial for misdirection was granted by the full Court in Rex v. Collins (N.B.), 3 E. L. R. 361, after a conviction of the prisoner, upon circumstantial evidence, for the murder of one Mary Ann McAuley. The deceased was housekeeper for Father McAuley, and the prisoner was in his employment. Father McAuley was absent from his house at the time of the murder—it was undoubtedly a murder. The prisoner, probably on the day of the

murder, had left the house, having stolen some goods, which were found on him. An axe was subsequently found in one of the rooms of the house, on which, it was said, there were blood stains and marks of paint. Some of the doors leading from the room in which the axe was found had been broken open. It was alleged by the Crown that the murder had been committed with that axe, and the doors broken open by it, and it was said that the prisoner, because he had committed the theft, was the one who had broken open these doors and had used the axe for that purpose. Nothing had been stolen from the rooms into which the doors that had been broken open led. The trial Judge told the jury, substantially, that there was no doubt but that the axe found in the house was the axe that committed the murder and the axe that broke open the doors, and no doubt the prisoner had that axe in his hands. This was held to be misdirection, because the Judge did not leave the evidence simply to the jury for them to come to their conclusion on, but rather himself drew the conclusions from the evidence.

Damages.]—In Barter v. Sprague's Falls Manufacturing Co. (N.B.), 3 E. L. R. 353, an action for trespass, the damages of the plaintiff were assessed by the jury at $2,000. This sum the full Court regarded as excessive, but felt compelled to follow the decision of the House of Lords in Watt v. Watt, [1905] A. C. 115, and order that there should be a new trial unless both parties consented to a reduction of the damages to $1,500. The old rule (as in Ontario) was that only the successful party need consent, and Hanington, J., thought it a better rule.

Easement.]—In Loggie v. Montgomery (N.B.), 3 E. L. R. 336, the appeal was to the full Court from the judgment of Barker, J., 3 N. B. Eq. 238, whereby the plaintiffs' bill to restrain the defendant from interfering with the plaintiffs' alleged right to bring water in a pipe across certain land owned by the defendant, was dismissed. The principal contention in support of the appeal based the right of

the plaintiffs to this easement on the presumption of a lost grant and a continuous uninterrupted user for a period of over 20 years. The Court referred to Rivers v. Adams, L. R. 3 Ex. 361, Campbell v. Wilson, 3 East 294, and Phillips v. Halliday, [1891] A. C. 228, and held that the presumption would, upon the evidence, be unjustifiable, the user of the pipe and water since the pipe was first laid in 1872 being referable exclusively to the title created by an agreement made in 1871.

Execution.]—An interesting historical review of the procedure in equity for the enforcement of decrees will be found in the opinion of Barker, J., which was concurred in by the majority of the full Court, in Petropolous v. Williams Co. (N.B.), 3 E. L. R. 370. The two questions which arose were these: (1) Does an arrest under an execution against the body for a money demand, issued by the Court of Equity for enforcement of a decree, operate as a satisfaction? (2) Has the Judge of a County Court jurisdiction under C. S. N. B. 1903 c. 130 to discharge persons in custody under such executions? The second question was easily solved. Any jurisdiction which a County Court Judge has, in a case like this, under c. 130, is derived from s. 42, which in its terms has sole reference to the case of persons in custody under attachment issued under that section. The execution in question not being an attachment, and not being issued under that section, the County Court Judge had no jurisdiction; and an order was made for prohibition. The other question arose upon an application to set aside a fi. fa. issued against the plaintiffs while they were in custody under an execution against the body, both being issued pursuant to a decree dismissing a bill in equity with costs. The Court gave effect to the contention that while the plaintiffs were in custody under an execution against their bodies, the defendants had neither right nor authority to issue a fi. fa. and levy upon the plaintiffs' goods. "How can it be argued," asked Barker, J., "that contempt of Court is the

foundation of the procedure, when the writ of execution and subpœna for costs, which were necessary under the old practice to put the party in contempt, were abolished half a century ago as useless, and nothing substituted in their place? The reasons upon which the old practice was founded have long since disappeared, and there is no reason why, in the case of a mere money demand, the practice as to the effect of arrest under a ca. sa. issued out of the equity side of the Court should not be brought into harmony with that which prevails on the law side. . . . . The policy of the Act (c. 130) seems altogether opposed to the idea that a debtor should be in custody under an execution, and at the same time liable to have his goods sold by the sheriff for the same debt."

Expropriation.]—The Sprague's Falls Manufacturing Company were incorporated under a Dominion statute, 2 Edw. VII. c. 103, for the purpose, among other things, of manufacturing pulp and paper, and by s. 7 were empowered to erect and maintain dams, and by s. 14 to take and acquire lands for the construction, maintenance, and operation of their mills, dams, etc., the provisions of the Railway Act to be applicable to the taking and acquisition and the compensation to be paid, etc. An action, Barter v. Sprague's Falls Manufacturing Co. (N.B.), 3 E. L. R. 353, was brought to recover damages for land of the plaintiff taken by the company, and for causing the land to be overflowed. The company admitted that they took the plaintiff's land, but they said that the plaintiff could not succeed in an action, but must proceed under the Railway Act to obtain compensation. The full Court did not accede to this view. "The company," said McLeod, J., "had no right to go on the land, except under and by virtue of the power contained in the Act incorporating them, and that Act only gave them the right to take the lands in the manner provided by the Railway Act, and it was their duty, in the first instance, to file the plan and take the steps towards expropriating provided in

and by that Act. This they did not do, and when they went on in the manner they did by their servants, they were simply trespassers from the beginning, and were liable in an action of trespass."

Holiday.]—The point decided in Rex v. McKay, Ex p. Cormier (N.B.), 3 E. L. R. 407, is that a conviction made on Easter Monday is valid, though that day is a public holiday. "Every public holiday is not a non-juridical day, and one upon which a conviction may not be made, if the magistrate elects to hear the case on such a day."

Libel.]—Rex v. Crocket (N.B.), 3 E. L. R. 330, is a celebrated cause, on account of the position of the informant, Henry R. Emmerson, who was Minister of Railways and Canals in the Dominion Government at the time when the defendant, James H. Crocket, published in the "Daily Gleaner" newspaper, a statement that "one of the places from which he," that is, Mr. Emmerson, "was ejected with two women of ill-repute with whom he had been keeping company not long since, was the St. Lawrence Hall," an hotel in Montreal. This statement was the ground of a criminal information for libel on the complaint of Mr. Emmerson. The defendant pleaded not guilty, and that it was true that Emmerson was ejected, etc. And for a second plea the defendant said that "before and at the time of the publication in the said indictment mentioned the said Henry R. Emmerson was Minister of Railways and Canals in the Government of Canada, and that the personal morals and conduct of members of the Government of Canada were and are matters of public interest, and had been discussed in Parliament and in the press, and it was desirable and proper in the public interest, and for the benefit of the public, that facts of a disgraceful and degrading character in the lives of Ministers of the Crown should be made known and published so that the Government of Canada might be purged of men whose personal character rendered them undesirable and unfit Ministers of the Crown, by reason whereof it was

for the public benefit that the said matters so charged in the said indictment should be published." This second plea was demurred to by the Crown, on many grounds, but Landry, J., the trial Judge, overruled the demurrer, saying: "The law authorized the defendant to plead as a defence the truth of the article complained of, and that its publication was for the benefit of the public. There seems to me no doubt that the defendant, by his plea filed, intends to justify on these two grounds. The question, therefore, is, has he used language in his pleas that covers technically the requirements of pleading to put these two elements in issue—the truth of the article and the benefit to the public from its publication? I believe he has. I do not feel free to decide, with my conception of the law, that the publication was not for the benefit of the public, provided that it can be proven to be true, and I believe the reasons given in the plea are sufficient to entitle the defendant to have his plea sustained." It will be observed that the learned Judge treats the second plea as if the first were part of it, and does not apparently decide that the second plea in itself would be a good answer to the indictment; that is, does not decide that the publication would be for the benefit of the public if the statement complained of were untrue.

EDITORIAL REVIEW.

The Canadian Law Times.

We apologize for the lateness of this issue, or rather for the omission of a September number. The necessity for holidays on the part of editor and contributors is responsible. There is a growing tendency to make August and September the holiday months. By the issue of a second November number, we shall make the tale complete for the year, and do justice to our readers, who will perhaps be sympathetic anent the aforesaid holidays.

A Court of Appeal for British Columbia.

At the last session of the legislature of British Columbia an Act was passed creating a Court of Appeal for the province, and requiring the appointment of 4 new Judges. The Act is to come into force upon proclamation by the Lieutenant-Governor, but it has not yet been proclaimed, although the business of the Courts is said to be congested. A section of the press accuses the local government of sinister motives for the delay. The appointment of Judges, however, rests with the Government at Ottawa, and, if we are to judge from recent appointments to the Bench, there is no reason to fear that any but the best available men will be raised to the seats of the mighty.

The Supreme Courts of the New Provinces.

The new provinces of Saskatchewan and Alberta have until now shared a Supreme Court between them—the Supreme Court of the North-West Territories continuing until the constitution of a new Supreme Court in each province. That has now been happily accomplished. The new Supreme Court of Saskatchewan has for its first Chief Justice the Hon. E. L. Wetmore, who was the senior puisne Judge of the old Court. The puisne Judges of Saskatchewan are the Hons. H. W. Newlands, J. E. P. Prendergast, and

T. C. Johnstone, formerly puisne Judges of the Territories, and the Hon. J. H. Lamont, who was Attorney-General for Saskatchewan up to the time of his appointment. The Hon. A. L. Sifton, who was Chief Justice of the Supreme Court of the Territories, now becomes Chief Justice of the Supreme Court of Alberta, and the Hons. D. L. Scott, Horace Harvey, and C. A. Stuart, of the old Court, become puisnes. The new Judge is Mr. N. D. Beck, K.C., of Edmonton. The new appointments are excellent.

Retirement of Mr. Blake.

The London Law Times has the following:—

"The Hon. Edward Blake, K.C., who has announced his intention, owing to ill-health and advancing years, of retiring from the representation of South Longford, for which he has sat for the last fifteen years, is probably the doyen of His Majesty's counsel learned in the law in the British dominions. Mr. Blake, who was called to the Upper Canadian Bar in 1856, was appointed a Queen's counsel in 1864: whereas Lord Hemphill, the doyen of King's counsel in Ireland, did not take silk till 1865; and Lord James of Hereford, the doyen of King's counsel in England, did not take silk till 1868. Mr. Blake's career in both the legal and political worlds has been one of extraordinary success and distinction. He has been Prime Minister of Ontario, and has had a seat in the Dominion Cabinet as Minister of Justice, Attorney-General, and President of the Council. He refused, moreover, the great office of Chancellor of Ontario, which had been previously filled by his father. He is in the House of Commons one of the five members nominated by the Speaker, in pursuance of Standing Orders, to act during the session as temporary chairman of committees when requested by the Chairman of Ways and Means, and, although he has long ceased to practise at the Canadian Bar, he has frequently appeared in Canadian appeals before the Judicial Committee of the Privy Council, where his arguments on constitutional questions have always carried weight."

Mr. Blake, we regret to learn, has carried out his intention of retiring, and has returned to Canada with the intention of ending his days in Toronto. It is sincerely to be hoped that his health may improve, and that he may be spared for some years of quiet usefulness to his native country. Those who sympathize and those who do not sympathize with his devotion to the Irish National party alike recognize the patriotism and unselfishness which inspired it. Nor will any one challenge his one time supremacy at the Bar of Ontario. We do not know exactly what the "Canadian Bar" is, but if it means the Bar practising before the Supreme Court of Canada, we think the same thing may be said.

A New Official Referee in Ontario.

The appointment of Mr. George Kappele, barrister, as an additional official referee, was, we understand, called for by the glut of work in the offices of the Master in Ordinary and the official referees who have their habitats at Osgoode Hall. Mr. Kappele's learning and experience, and more especially his ability and energy, mark him out as an ideal referee. In fact, a man so eminently fitted for a post who is willing to take it is seldom found.

The Lord Chancellor in Canada.

Lord Loreburn, who embarked on the 6th September for Canada, is probably the first Lord Chancellor during the tenure of his office to visit America, although one Lord Chancellor, John Singleton Copley (Lord Lyndhurst) was born in Boston before the war of the American Independence; and another Lord Chancellor, Lord Herschell, who, after his retirement from the Woolsack, was nominated by Lord Salisbury's Government a member of the Anglo-Venezuelan Arbitration Commission, died at Washington in 1899, while serving on that commission. Lord Loreburn, in leaving the realm, has, no doubt, observed the rule that the Great Seal

should not be taken abroad, which was, according to Lord Campbell, observed by all Chancellors except Cardinal Wolsey, who in 1521 carried it with him into the Low Countries, and sealed writs with it at Calais—a supposed violation of duty which formed one of the articles of his impeachment. Indeed, the better opinion is that the Great Seal cannot be used out of the realm, even by the Sovereign. Edward I. having himself affixed the Great Seal at Ghent to a confirmation of the charters, the Earls of Norfolk and Hereford objected that this act in a foreign country was null, and the charters were again confirmed under the Great Seal on the King's return to England. (Campbell's Lives of the Chancellors, i., pp. 23-24). The above is from our English contemporary, the Law Times. The Lord Chancellor's visit to Canada was of very brief duration. It is believed that he landed at Quebec, and visited Montreal, Toronto, and Niagara Falls, returning to England by the ship which brought him out, but he preserved a strict incognito, and no public honours were accorded to him. Perhaps he may repeat his visit when he has more time and is in better health.

Sir James Gowan.

"A veteran Canadian jurist," says the London Law Times, "is now paying us a visit in the person of Sir James Gowan. Born in Wexford, Ireland, ninety-two years ago, Sir James was only seventeen when he accompanied his parents to Canada. He was studying law in Toronto when the Canadian rebellion of 1837 broke out. Throwing his text-books aside, he shouldered his gun as a volunteer on the side of law and order. He was a lieutenant when the outbreak was suppressed. In 1839 he was called to the Bar, and four years later, at the unusually early age of twenty-eight, he was made a District Judge. He remained on the Bench for forty-one years, and then entered the Senate, the Canadian Upper House, from which he retired only two years ago."

Death of Mr. James Dunbar,

Mr. James Dunbar, K.C., died at Quebec on the 5th August, at the age of seventy-four. The son of an officer in the 74th Highlanders, he was born in Ireland, but educated in Quebec. From 1854 to 1857 he was editor of the Quebec Daily Chronicle. Called to the Bar of Lower Canada in 1856, he had been for many years at the head of his profession. He was elected batonnier-general of the province in 1895, having been made batonnier of the ancient capital twenty years before. These honours derive peculiar significance from the fact that the legal profession of the province is by overwhelming majority French. He was appointed Registrar of the Vice-Admiralty Court of Quebec in 1873; and for many years he acted as Crown Prosecutor. A greatly respected member of the Church of England, he held a seat in both the Provincial and the General Synod; he had been Chancellor of Quebec diocese since 1897; and in 1895 he received the honorary D.C.L. from the University of Bishop's College, Lennoxville. He also held high rank as a Freemason, being a Past Grand Master of the Grand Lodge of Quebec and a Past Grand Principal of the Grand Chapter of the Royal Arch Masons of Canada. His son, Lieutenant-Colonel J. S. Dunbar, is D.A.A.G. at Montreal.

Death of Colonel J. E. Halliwell.

The following resolution was passed at a recent meeting of the County of Hastings Law Association:—Moved by Mr. John Parker Thomas, seconded by Mr. John J. B. Flint, "That the members of the County of Hastings Law Association tender their sincere and heartfelt sympathy to Mrs. Halliwell and to her little ones in this hour of deep bereavement. And they further desire to record their own personal sense of loss through the decease of their late friend and brother barrister Lieutenant-Colonel John Earl Halliwell, whose sad and sudden death has deprived the Bar of an earnest and able advocate, Canada of a loyal and public-

spirited citizen, and friends of a genial and true-hearted comrade." Colonel Halliwell, whose death is recorded, practised in Stirling, in the county of Hastings; he was called and admitted in 1880; saw active military service in the North-west Rebellion; and was for many years keenly interested in militia affairs, besides being busy in church, educational, and Masonic work and service. He was an excellent type of a Canadian country lawyer.

Boys in Law Offices.

The following remarks of the London Law Times are fairly applicable to the position of the boy in many a barrister's or solicitor's office in Canada. These boys have a good deal of leisure at irregular times, and seem to employ it largely in sensational reading.

"The problem of boy work is one of the most serious social questions at the present day. It is admirably discussed in a recent little book by a clergyman, the Rev. Spencer J. Gibb. The longest chapter is devoted to an excellent synopsis of the statute law bearing upon the subject. But the preface by Canon Scott Holland suggests that, even for readers of these columns, the economic aspect is of more importance than the legal. 'We touch buttons, press knobs, ring bells, whisper down telephones, keep wires throbbing with our desires, bustle and hustle the world along. And all this, in the end, means boys. Boys are the material in which we deal. Boys are our tools; every wire has a boy at the end of it. Every message starts a boy. Every parcel hurried, every bit of latest news, every pressure for the quickened movement of affairs, is a call for boys.' Few people have fuller opportunity to realize the truth of this description than the barrister, who requires that a boy should be always at his beck and call. At the same time it must be admitted that the kind of life led by the boy justifies the condemnation passed by the book upon this irregular employment. Too often it leads nowhere. The boys tend to join the rank of the "unemployed," though apparently in a somewhat

higher grade than the loafers and ne'er-do-wells generally described by that word. . . . The life of a boy in a barrister's chambers very often leaves him a considerable amount of leisure, with the inevitable result that, if he does not fall into downright bad habits, he wastes the years of his life when there is most need for the development of his faculties. The earlier working years are, in fact, much more years of education than the years which have been spent at school. There would be no great difficulty in encouraging the boys to attend evening classes, which would at the same time provide some definite occupation for the spare intervals during the day. Even the boy who is fond of reading simply fills his head with sensational stories which effectually obliterate any inclination to higher thoughts or attention to serious matters. With practice in handwriting, composition, arithmetic, and geography, the boy . . . will have some marketable commodities, which, backed by a good recommendation, should enable him to find satisfactory employment without difficulty. At the same time it has to be remembered that the boy cannot be expected to give himself entirely to the work in the day and study in the evening."

Probably very few professional men realize their responsibilities in this regard.

Recent American Decisions.

Agent's Commission.—An owner of real estate who sells his property to one induced to purchase it by the efforts of an agent with whom it has been listed for sale for a definite price, but who was not given an exclusive agency, is held, in Quist v. Goodfellow (Minn.), 8 L. R. A. (N.S.) 153, not to be liable for the commission agreed to be paid for the production of a purchaser ready, able, and willing to buy, where the owner acted in good faith and in ignorance of the efforts of the agent, and sold the property for a price less than that named to the agent.

Banks and Banking.—Whether or not a bank receiving and crediting to a depositor a cheque on another bank is entitled to enforce it as owner, is held, in Fayette Nat. Bank

v. Summers (Va.), 7 L. R. A. (N.S.) 694, to depend upon its having been the intention of the parties that the deposit shall be treated as cash, which fact is to be determined by the jury.

A bank depositor who intrusts the examination of the pass books and returned vouchers to an agent, who has been guilty of raising its cheques, is held, in First Nat. Bank v. Richmond Electric Co. (Va.), 7 L. R. A. (N.S.) 744, to be charged with such knowledge as the agent has in making the examination.

A bank which has paid an overdraft of a local agent upon the bank account of his principal, who resides in another state, without ascertaining the authority of the agent, is held, in Merchants' Nat. Bank v. Nichols & Shepard Co. (Ill.), 7 L. R. A. (N.S.) 752, not to be able to assert failure of the principal to examine the pass book and returned vouchers after the balancing of the account, as an estoppel upon the principal to deny liability for the overdraft.

Carriers.—The liability of a railway company for the death of a passenger who, although under the influence of liquor, was not so intoxicated that the company would have been justified in refusing to accept him as a passenger, is denied in Thixton v. Illinois C. R. Co. (Ky.), 8 L. R. A. (N.S.) 298, where the carrier, after placing him in a place of safety at a junction where a change of cars was necessary, failed to maintain a guard over him, so that he wandered upon the track and was killed by an incoming train.

Railway employees in charge of a passenger train are held in Illinois C. R. Co. v. Cruse (Ky.), 8 L. R. A. (N.S.) 299, not to be bound to anticipate the need of assistance of a woman in feeble health, incumbered with a young child and a valise, so as to render the carrier liable in case she falls while attempting to carry her burdens off the train without assistance.

Damages.—The damages to be allowed for negligent loss of a manuscript which has not been put upon the market

for sale so as to have a market value, are held, in Southern Express Co. v. Owens (Ala.), 8 L. R. A. (N.S.) 369, to be properly based upon what it is worth to the owner, to ascertain which the cost of its production may be considered.

Deceit.—Suspicion that a statement of facts made to effect the sale of a chattel may be false is held, in Shackett v. Bickford (N.H.), 7 L. R. A. (N.S.) 646, to be sufficient, if it proves to be so, to sustain an action for deceit.

Executors and Administrators.—An administrator who deposits funds in a bank in good standing in the community, and promptly distributes the interest to the next of kin, is held, in Knapp v. Jessup (Mich.), 7 L. R. A. (N.S.) 617, not to be liable for loss caused by the failure of the bank, no negligence on his part being shewn, and the exigencies of administration requiring the fund to be kept on hand.

Husband and Wife.—A son of consumptive parents is held, in Grover v. Zook (Wash.), 7 L. R. A. (N.S.) 582, not to render himself liable in damages for refusal to perform his promise to marry a woman afflicted with pulmonary consumption, although he knew at the time of making the promise that she was so afflicted,—at least where such marriage would violate the spirit of the statute against the spread of such disease.

Imprisonment.—Words are held, in Martin v. Houck (N.C.), 7 L. R. A. (N.S.) 576, to be sufficient to constitute an imprisonment, if they impose a restraint on a person, and if he is actually restrained.

The essential thing to constitute an imprisonment is held, in Hebrew v. Pulis (N.J. Err. & App.), 7 L. R. A. (N.S.) 580, to be constraint of the person, which may be by threats as well as by actual force.

Insurance.—One running to a base while playing indoor baseball is held, in Hunt v. United States Acci. Asso. (Mich.), 7 L. R. A. (N.S.) 938, not to voluntarily expose himself to

unnecessary danger, within the meaning of an accident insurance policy, by merely over-running his base and relying on the wall of the building to stop him when he places his hands and feet against it.

Limitation of Actions.—The rule that a new promise, or part payment, suspends the operation of the Statute of Limitations, or revives and continues the cause of action, is held, in Olson v. Dahl (Minn.) 8 L. R. A. (N.S.) 444, to be limited to contracts express or implied, and not to include a judgment for the recovery of money, which is not a contract within the meaning of the term. A note reviews the other authorities on effect of new promise or payment on barred judgment.

Lost Property.—The finder of lost property or treasure trove is held, in Kuykendall v. Fisher (W. Va.), 8 L. R. A. (N.S.) 94, to acquire, by the act of finding, no right of property therein as against the owner, but to be entitled to the possession thereof as a quasi depositary, holding for the owner as against all other persons.

Master and Servant.—The invention by a thirteen-year-old boy of a device to protect his fingers from the discomfort of handling links upon which he is employed to operate a drill, and which become heated and require handling because of defects in the drilling apparatus, which invention is unprecedented in experience, and the use of which results in the entangling of the boy's hand with the machinery to its injury, is held, in Stefanowski v. Chain Belt Co. (Wis.), 7 L. R. A. (N.S.) 955, to be such an intervening cause as to destroy the proximity of the defect in the drill as a cause for the injury, and to relieve the master from liability therefor.

Replevin.—The right of one from whom property has been taken in replevin to maintain a similar action for its recovery is denied in Kierbow v. Young (S.D.), 8 L. R. A. (N.S.) 216. The other authorities on this question are collated in a note to this case.

Ship.—Those in charge of a steamship creating waves which endanger the lives of the occupants of a small boat near it are held, in Daniels v. Carney (Ala.), 7 L. R. A. (N.S.) 920, to be bound to stop the normal operation of their boat until the small boat has passed out of the zone of danger.

Trust.—A devise to the vestry of a parish, to be used for such church purposes as the rector of the church shall or may direct, is held, in Doan v. Vestry of the Parish of the Ascension (Md.), 7 L. R. A. (N.S.) 1119, to create no trust, but to be for the corporate purposes of the vestry, and to vest the absolute title in it.

Will.—A proper attestation of a will by a witness is held, in Re Pope (N.C.), 7 L. R. A. (N.S.) 1193, to be effected, the other requirements being present, if he holds the end of a pen while it is guided by another in the writing of his name, even though such aid is not necessary because the witness can write.

BOOK REVIEW.

King's Law of Defamation in Canada.—A Treatise on the Principles of the Common Law and the Statutes of the Canadian Provinces concerning Slander and Libel as Civil Wrongs, with the Articles of the Criminal Code of Canada concerning Libel as an Indictable Offence: by John King. M.A., K.C., of Osgoode Hall, Toronto, one of the Lecturers of the Law Society of Upper Canada. Toronto: The Carswell Company, Limited: 1907.

This, though a large book (935 pages), is only part of a still larger work projected by the author. The design is to embrace both the civil and criminal law of libel and the law of contempt affecting publications prejudicial to the course of justice in the courts, and publications and proceedings in contempt of legislatures, their committees and members. Treatises on the criminal division of the subject and on the branches of the law of contempt alluded to are promised at an early date. What is now published embodies the law of slander and libel in civil cases in Canada. It contains the substance of the common law of defamation and of the English decisions, a digest and commentary combined of the law peculiar to the several Canadian provinces, and the libel sections of the Criminal Code which are applicable to the Dominion as a whole. These are supplemented by the chapters on Discussion of Matters of Public Interest, Privilege and Fair Comment, which relate in the main to libel both as a tort and a crime. The articles in the Code Civile of the province of Quebec and the decisions of the Courts of that province are also dealt with, and some references are given to United States decisions. The work is, perhaps especially, a digest of Canadian cases, including the most recent. Every reported decision of any importance has been assigned a place—none being treated as altogether obsolete or useless—and a few have been included which are

of historic rather than of legal interest. This brief synopsis gives a fair idea of the aim and scope of the work. If the material were merely thrown together in haphazard style, the book would be a useful one. But Mr. King has done his work well—the arrangement is thoroughly scientific, and the indexing excellent. The typography and general appearance also are attractive. We predict for the book the success with the legal public which its excellence deserves.

PERIODICALS AND PAMPHLETS.

Law Quarterly Review (London, Eng., July, 1907):—"Legal Education in London," by Sir Thomas Raleigh, K.C. S. I.; "Possibilities in Legal Education," by Edward Jenks; "Lateral Support under the Waterworks Clauses Act." by Charles Tennyson; "The Status of Foreign Corporations and the Legislature" (II.), by E. Hilton Young; "British Land Law in the New Hebrides," by James E. Hogg; "The Justice of the Peace." by Charles S. Lobingier; "Possession and Ownership" (II.), by Albert S. Thayer; "Acts of Omission as Breaches of Covenants for Title," by T. F. Martin.

South African Law Journal (Grahamstown, Cape of Good Hope, 15th August, 1907):—"The Hon. Jacob de Villiers" (with portrait); "The Batavian and the Cape Plakaten," by C. H. Van Zyl; "Covering Bonds;" "A Short History of the Liquor Question and an Analytical and Comparative Consideration of its Legislation," by William T. Lee; "The Effect of Illegality on Contract," by C. J. Ingram; "Divorce;" "Debentures as Negotiable Instruments."

Natal Law Quarterly (30th June, 1907):—"Division of the Bar in Natal," by Theodore W. Jackson.

Criminal Law Journal of India (Lahore, 30th June, 30th August, 1907):—"The Judiciary and Public Sentiment;" "The Ethics of Advocacy;" "The Abolition of Capital Punishment;" "Duties of Medical Care for Others;" "Examination of Witnesses;" "Law of Attempts."

The Green Bag (Boston, September, October, 1907):—"The Rt. Hon. James Bryce" (with portrait), by Edward Manson; "Constructive Contracts," by George P. Costigan jun.; "The Wisconsin Public Utilities Act," by Eugene A.

Gilmore; "Jottings of an Old Solicitor" (Sir John Hollam), by J. G. Cotton Minchin; "Corporations Subject to Bankruptcy," by R. Jackson Cram; "A Study of Mexican Criminal Procedure as Illustrated in the Barillas Case" (II.), by Joseph Wheless; "Jacob M. Dickinson" (with portrait), by S. S. Gregory; "The Influence of National Character and Historical Environment on the Development of the Common Law," by the Rt. Hon. James Bryce; "President's Annual Address," by the Hon. Alton B. Parker; "The Nation and the Constitution," by the Hon. Charles F. Amidon; "The Need of a Sociological Jurisprudence," by Roscoe Pound.

Albany Law Journal (September, 1907):—"Corporate Citizenship as a Legal Fiction," by the Hon. R. M. Benjamin; "The President's Proposal for a Federal Railroad System," by Edward L. Andrews; "The True Constitution—Suggestions toward its Interpretation," by Joseph Culbertson Clayton; "Lord Chancellor Erskine," by the Hon. R. Erskine; "The Alienist in the Courts of Law," by R. W. Shufelt; "Ancient Irish Common Law Pleading," by Joseph M. Sullivan.

Case and Comment (Rochester, N.Y., August, 1907):—"Prohibiting School Fraternities;" "The Breaking-down of Our System of Criminal Justice;" "How to Punish Business Men."

Canadian Law Review (Toronto, August, September, 1907):—"The Law of Certiorari in the Province of Manitoba," by M. G. Macneil; "County and Division Courts in Ontario—Extension of Jurisdiction;" "The Doctrine of Common Employment in England and Canada," by J. P. MacGregor.

Dominion of Canada Labour Gazette (Ottawa, August, September, 1907):—"Cost of Living, 1897-1907—Investigation at Ottawa by Civil Service Association;" "The Indus-

trial Disputes Investigation Act, 1907;" "The Fuel Supply in Saskatchewan;" "Legislation in Canada with Regard to Mechanics and Wage Earners' Liens;" "The Quebec Bridge Disaster."

Federal Reporter (National Reporter System, St. Paul, Minn., 1st, 8th, 15th, 22nd August, 5th, 12th, 19th, 26th September, 3rd October, 1907.)

Chicago Legal News (10th, 17th, 31st August, 14th, 21st September, 5th October, 1907.)

Central Law Journal (St. Louis, Mo., 2nd, 9th, 16th, 23rd, 30th August, 6th, 20th September, 1907.)

Law Student's Helper (Detroit, Mich., September, 1907.)

Law Notes (Northport, New York, August, September, October, 1907.)

Punjab Law Reporter (Lahore, June-July, 1907.)

Madras Law Journal (Mylapore, Madras, July, 1907.)

Criminal Law Notes (Parvatipur, vol. 5, part 8, 1907.)

Madras Law Times (5th, 12th, 19th, 26th July, 2nd August, 1907.)

Calcutta Weekly Notes (1st, 15th, 22nd, 29th July, 12th, 19th, 26th August, 2nd September, 1907.)

Kathiawar Law Reports (Limbdi, May, June, July, August, 1907.)

The Digest (Lahore, November-December, 1906.)

The Citator (Madras, April, May, 1907.)

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.] [24TH JUNE, 1907.

SCOTT v. SWANSON.

Mortgage—Redemption—Priorities — Execution — Creditors proving claims in Master's office—Payment of mortgagee's claim—Subsequent statutory assignment by mortgagor for benefit of creditors—Rights of assignee—Assignments and Preferences Act, s. 11.

After judgment for foreclosure of mortgage or redemption, judgment creditors of the mortgagor with executions in the sheriff's hands were added as parties in the Master's office, and proved their claims. The Master reported that they were the only incumbrancers, and fixed a date for payment by them of the amount due to the mortgagees. After confirmation of this report, S. obtained assignments of the judgments, and was added as a party. He then paid the amount due to the mortgagees, and the Master took a new account and appointed a day for payment by the mortgagor of the amount due S. on the judgments as well as the mortgage. This report was confirmed, and, the mortgagor having made an assignment for the benefit of creditors before the day fixed for redemption, an order was made by a Judge in Chambers adding the assignee as a party, extending the time for redemption, and referring the case back to the Master to take a new account and appoint a new day.

Held, affirming the judgment of the Court of Appeal in *Federal Life Assurance Co.* v. *Stinson*, 13 O. L. R. 127, 8 O. W. R. 929, that under the provisions of s. 11 of the Assignments and Preferences Act, the assignee of the mortgagor

could only redeem on payment of the total sum due to S. under the mortgage and the judgments assigned to him.

D. L. McCarthy, for the appellant.

H. Cassels, K.C., and *R. S. Cassels,* for the respondent.

GRAND TRUNK R. W. CO. v. CANADIAN PACIFIC R. W. CO.

Specific performance—Tender for land—Agreement for tender—One party to acquire and divide—Division by plan—Reservation of portion of land from grant.

By agreement through correspondence the Grand Trunk Railway Company were to tender for a triangular piece of land, containing 19 acres, offered for sale by the Ontario Government, and convey half to the Canadian Pacific Railway Company, who would not tender. Division was to be made according to a plan of the block, with a line drawn through the centre from east to west, the Canadian Pacific Railway Company to have the northern half. The Grand Trunk Railway Company acquired the land, but the government reserved from the grant two acres in the northern part. In an action by the Canadian Pacific Railway Company for specific performance of the agreement:—

Held, affirming the judgment of the Court of Appeal in *Canadian Pacific R. W. Co.* v. *Grand Trunk R. W. Co.*, 14 O. L. R. 41, 9 O. W. R. 158, MACLENNAN and DUFF, JJ., dissenting, that the Canadian Pacific Railway Company were entitled to one-half of the land actually acquired by the Grand Trunk Railway Company, and not merely to the remainder of the northern half as marked on the plan.

The Court of Appeal directed a reference to the Master in case the parties could not agree on the mode of division.

Held, that such reference was unnecessary, and that the judgment appealed against should be varied in this respect.

Walter Cassels, K.C., and *M. K. Cowan,* K.C., for the appellants.

E. D. Armour, K.C., and *Angus MacMurchy,* for the respondents.

KERSTEIN v. COHEN.

Trade mark—Infringement—Inventive term—Coined word—Exclusive use—Colourable imitation—Common idea—Description of goods—Deceit and fraud.

The hyphenated coined words "shur-on" and "staz-on" are not purely inventive terms, but are merely corruptions of words descriptive of the goods (in this case, eye-glass frames) to which they were applied, intending them to be so described, and, therefore, they cannot properly be the subject of exclusive use as trade marks. A trader using the term "staz-on" as descriptive of such goods, is not guilty of infringement of any rights in the use of the term "shur-on" by another trader as his trade mark, nor of fraudulently counterfeiting similar goods described by the latter term; nor is such a use of the former term a colourable imitation of the latter term calculated to deceive purchasers, as the terms are neither phonetically nor visually alike.

The judgment appealed from, 13 O. L. R. 144, 8 O. W. R. 934, was affirmed.

W. Cassels, K.C., and *J. A. Macintosh*, for the appellants.

J. H. Moss and *C. A. Moss*, for the respondnts.

ROBINSON v. McGILLIVRAY.

Bankruptcy and insolvency—Preferential transfer of cheque—Deposit with private banker—Application of funds to debt due banker—Sinister intention—Payment to creditor—R. S. O. 1897 c. 147, s. 3.

McG., a merchant in insolvent circumstances, although not aware of that fact, sold his stock-in-trade, and deposited the cheque received for the price to the credit of his account with a private banker, to whom he was indebted, at the time, upon an overdue promissory note that had been, without his knowledge, charged against his account a few days before the sale. Within two days after making the deposit, McG. gave the banker his cheque to cover the amount of the note.

In an action to have the transfer of the cheque so deposited set aside as preferential and void:—

Held, affirming the judgment appealed from, 13 O. L. R. 232, 8 O. W. R. 602, that the transaction was a payment to a creditor within the meaning of R. S. O. 1897 c. 147, s. 3, s.-s. 1, which was not, under the circumstances, void as against creditors.

G. C. Gibbons, K.C., for the appellants.

T. G. Meredith, K.C., and *F. R. Blewitt,* for the respondents.

In re SINCLAIR AND TOWN OF OWEN SOUND.

Municipal corporations—Local option by-law—Voting on by electors—Division of town into wards—Single or multiple voting—3 Edw. VII. c. 19, s. 355.

Section 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided nto wards, each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law," does not apply to the vote on a local option by-law required by s. 141 of the Liquor License Act, R. S. O. 1897 c. 245.

Judgment of the Court of Appeal, 13 O. L. R. 447, 8 O. W. R. 974, affirming that of a Divisional Court, 12 O. L. R. 488, 8 O. W. R. 460, affirmed.

W. Nesbitt, K.C., and *W. H. Wright,* for the appellant.

F. E. Hodgins, K.C., and *J. W. Frost,* for the respondents.

QUEBEC.] [24TH JUNE, 1907.

ST. LAWRENCE TERMINAL CO. v. HALLE.

ST. LAWRENCE TERMINAL CO. v. RIOUX.

Seigniorial lands—Promise of sale—Entry—Good faith—Commencement de preuve par ecrit—Improvements—Compensation.

The appellants, plaintiffs, were the grantees of the lands in question, part of the Seigniory of Metapedia, the

former proprietors of which had an agent resident in the seigniory who administered their affairs there. It had been customary, on applications by intending settlers for the purchase of lots of their wild lands, for this agent to take memoranda of their names and permit them to enter upon the lands, and this was done in respect to the lots in question, and the applicants were allowed to hold possession and make improvements thereon without notice of any special conditions limiting the titles which might subsequently be granted to them by the owners. The defendants, respondents, acquired the rights of these applicants, and when the plaintiffs tendered deeds of the said lots to them, they refused to accept them, on the ground that conditions were inserted which had not been stipulated at the time of the original entries upon the lots, and of which no notice had been given. In actions *au petitoire* the defendants pleaded that their possession had been in good faith in expectation of eventually receiving titles without such restrictive conditions as were sought to be imposed, and that, in the event of eviction, they were entitled to full compensation for the value of all necessary improvements made on the lands without deductions in respect of rents, issues, and profits.

Held, affirming the judgments appealed from, FITZPATRICK, C.J.C., and DUFF, J., dissenting, that the memoranda made by the agent were *commencement de preuve par écrit* and equivalent to a binding promise of sale without usual conditions in limitation of any titles which might be granted.

(2) That the entries made upon the lands, the possession thereof held by the defendants and their auteurs, and the works done by them thereon, could not be held to be in bad faith, nor with knowledge of defective title.

(3) That, under the circumstances and notwithstanding that the defendants had actual notice of prior title, the plaintiffs could not maintain actions *au petitoire*, although they might be entitled to declarations in confirmation of the deeds tendered, and to recover the price of the lots.

(4) That the defendants could not be evicted without compensation for the full value of the necessary and useful improvements so made upon the lands, with the knowledge and consent of the agent, without any deductions in respect of the rents, issues, and profits derivable from the lands.

Price v. *Nault*, 12 App. Cas. 110, followed.

Lajoir v. *Dean*, 3 Dor. Q. B. 69, distinguished.

Lafleur, K.C., and *Peers Davidson*, K.C., for the appellants.

G. G. Stuart, K.C., and *Fiset*, for the respondents.

CHICOUTIMI PULP CO. v. PRICE.

Appeal to Court of King's Bench—Right of appeal—Judgment by Court of Review within time limited for appealing—Arts. 1208, 1209, C.P. Q.—Pleading and practice—Injunction—Discretionary order—Reversal on appeal—Possessory action — Trouble de possession — Right of action—Actio negatoria servitutis — Trespass — Interference with watercourse—Agreement as to user—Expiration of privilege by non-user—Tacit renewal—Cancellation of agreement —Recourse for damages.

An appeal from a judgment of the Superior Court, rendered on the trial of a cause, will lie to the Court of King's Bench, appeal side, if taken within the time limited by art. 1209 of the Code of Civil Procedure of Quebec, notwithstanding that in the meantime, on an appeal by the opposite party, the Court of Review may have rendered a judgment affirming a judgment appealed from.

Although the granting of an order for injunction, under art. 957 of the Code of Civil Procedure of Quebec, is an Act dependent on the exercise of judicial discretion, the Supreme Court of Canada, on appeal, reversed the order, on the ground that it had been improperly made, as the evidence shewed that the plaintiff could otherwise have obtained such full and complete remedy as he was entitled to under the circumstances of the case.

DAVIES and IDINGTON, JJ., dissenting, were of opinion that the order had been properly granted.

A possessory action will not lie in a case where the *trouble de possession* did not occur in consequence of the exercise of an adverse claim of right or title to the lands in question, and is not of a permanent or recurring nature.

DAVIES and IDINGTON, JJ., dissenting, were of opinion that, in the circumstances of the case, a possessory action would lie.

P. brought an action *au possessoire* against the company for interference with his rights in a stream, for damages, and for an injunction against the commission or continuance of the acts complained of. On service of process, the company ceased these acts, admitted the rights and title of P., alleged that they had so acted in the belief that a verbal agreement made with P. some years previously gave them permission to do so, that the agreement had never been cancelled, but was renewed from year to year, and that, although the privilege had not been exercised by them during the two years immediately preceding the alleged trespass in 1904, it was then still subsisting and in force.

Held, reversing the judgment appealed from, DAVIES and IDINGTON, JJ., dissenting, that, as there had been no formal cancellation of the verbal agreement or withdrawal of the permission thereby given, it had to be regarded, notwithstanding non-user, as having been tacitly renewed, and that it was still in force at the time of the acts complained of, and that P. could not recover in the action as brought.

FITZPATRICK, C.J.C., on his view of the evidence, dissented from the holding that the agreement had been tacitly renewed for the year 1904, in which the alleged trespass was committed.

Belleau, K.C., for the appellants.

G. G. Stuart, K.C., for the respondent.

CLICHE v. ROY.

Deed—Construction—Title to land — Servitude — Acquiescence — Estoppel by conduct—Actio negatoria servitutis—Operation of waterworks.

By a deed executed in 1879 C. granted to R. the right of building a reservoir in connection with a system of waterworks, laying pipes and taking water from a stream on his land, and in 1897 executed a deed of lease of the same land to him, with the right, for the purposes of the waterworks established thereon, "de vaquer sur tout le terrain . . . et le droit d'y conduire des tuyaux, y faire des cisternes et autres travaux, en rapport au dit acqueduc et aux réparations d'icelui."

Held, that the deed executed in 1897 gave R. the right of bringing water from adjoining lands through pipes laid on the lands so leased.

Judgment of the Court below affirmed.

A. Taschereau, K.C., for the appellant.

Morin, for the respondent.

AUDETTE v. O'CAIN.

Easement—Rights appurtenant to dominant tenement—Construction of ice-house—Change in natural conditions—Flooding of servient tenement—Aggravation of servitude — Injunction — Damages — Abatement of nuisance—Arts. 406, 501, 549, C. C.

The construction upon a dominant tenement of an ice-house in such a manner as to cause the water from melting ice stored therein to flow down upon the adjoining lands on a lower level, and cause injuries to the property, is an aggravation of the natural servitude for which the owner of the servient tenement is entitled to recover damages for the injury resulting therefrom, and to have a decree for the abatement of the nuisance.

Judgment of the Court below affirmed.

Beaudin, K.C., and *Belcourt*, K.C., for the appellant.

Bisaillon, K.C., and *H. R. Bisaillon*, for the respondent.

NOVA SCOTIA.] [24TH JUNE, 1907.

CITY OF HALIFAX v. McLAUGHLIN CARRIAGE CO.

Appeal—Stated case—Provincial legislation—Assessment—Municipal tax—Foreign company—"Doing business in Halifax."

An Ontario company resisted the imposition of a license fee for "doing business in the city of Halifax," and a case was stated and submitted to the Supreme Court of Nova Scotia for an opinion as to such liability. On appeal from the decision of that Court to the Supreme Court of Canada, counsel for the corporation of the city of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Court of the province, and therefore, and because the proceedings did not originate in a superior court, the appeal to the Supreme Court of Canada did not lie.

Held, per FITZPATRICK, C.J.C., and DUFF, J., that, as the appeal was from the final judgment of the Court of last resort in the province, this Court had jurisdiction under the provisions of the Supreme Court Act, and it could not be taken away by provincial legislation.

Per DAVIES, J.:—Provincial legislation cannot impair the jurisdiction conferred upon this Court by the Supreme Court Act. In this case the Supreme Court of Nova Scotia had jurisdiction under Order xxxiii., Rule 1, of the Judicature Act.

Per IDINGTON, J.:—If the case was stated under the Judicature Act Rules, the appeal would lie, but not if it was a submission under the charter for a reference to a Judge at request of a ratepayer.

By s. 313 of the charter (54 V. c. 58), as amended by 60 V. c. 44, "every insurance company or association, accident and guarantee company, established in the city of Halifax, or having any branch office or agency therein, shall . . . pay an annual license fee as hereinafter mentioned . . . . Every other company, corporation, association, or agency doing business in the city of Halifax (banks, insurance companies, or associations, etc., excepted) shall . . . . pay an annual license fee of one hundred dollars."

Held, that the words "every other company" in the last clause were not subject to the operation of the *ejusdem generis* rule, but applied to any company doing business in the city. Judgment appealed from reversed on this point.

A carriage company agreed with a dealer in Halifax to supply him with their goods, and gave him the sole right to sell the same in a territory named, on commission, all moneys and securities given on any sale to be the property of the company, and goods not sold within a certain time to be returned. The goods were supplied and the dealer assessed for the same as his personal property.

Held, DAVIES and MACLENNAN, JJ., dissenting, that the company were not "doing business in the city of Halifax," within the meaning of s. 313 of the charter, and not liable for the license fee of $100 thereunder.

Judgment of the Court below, 39 N. S. R. 403, 1 E. L. R. 58, affirmed.

F. H. Bell, for the appellant.

E. L. Newcombe, K.C., for the respondents.

NEW BRUNSWICK.] [24TH JUNE, 1907.

FLEMING v. McLEOD.

Promissory note—Protest in London, England—Notice of dishonour to indorser in Canada—Knowledge of address—First mail leaving for Canada—Notice through agent—Agreement for time—Discharge of surety—Appropriation of payments—Evidence.

Notes made in St. John, N.B., were protested in London, England, where they were payable. The indorser lived at

Richibucto, N.B. Notice of dishonour of the first note was mailed to the indorser at Richibucto, and, at the same time, the protest was sent by the holders to an agent at Halifax, N.S., instructing him to take the necessary steps to obtain payment. The agent, on the same day that he received the protest and instructions, sent, by post, notice of the dishonour to the indorser at Richibucto. As the other notes fell due, the holders sent them and the protests, by the first packet from London to Canada, to the same agent at Halifax, by whom the notices of dishonour were forwarded to the indorser at Richibucto.

Held, IDINGTON and DUFF, JJ., dissenting, that the sending of the notice of dishonour of the first note direct from London to Richibucto, with the precaution of also sending it through the agent, was an indication that the holders were not aware of the correct address of the indorser, and the fact that they used the proper address was not conclusive of their knowledge, or sufficient to compel an inference imputing such knowledge to them. Therefore, the notices in respect to the other notes sent through the agent were sufficient.

Per IDINGTON and DUFF, JJ., dissenting, that the holders had failed to shew that they had adopted the most expeditious mode of having the notices of dishonour given to the indorser.

The maker of the note gave evidence of an offer to the holders to settle his indebtedness, on certain terms and at a time some two or three years later than the maturity of the last note; and that the same was agreed to by the holders. The latter, in their evidence, denied such agreement, and testified that, in all the negotiations, they had informed the maker that they would do nothing whatever in any way to release the indorser.

Held, that the evidence did not shew that there was any agreement by the holders to give time to the maker, and the indorser was not discharged. If the existence of an agree-

ment could be gathered from the evidence, it was without consideration, and the creditor's rights against the sureties were reserved.

Per IDINGTON and DUFF, JJ., that a demand note given in renewal of a time note and accepted by the holders is not a giving of time to the maker by which the indorser is discharged.

Judgment of the Supreme Court of New Brunswick, 37 N. B. R. 630, 2 E. L. R. 180, reversed.

Appeal allowed with costs.

Teed, K.C., for the appellants.

W. D. Carter, for the respondent.

DALY v. BROWN.

In re ESTATE OF PAUL DALY.

Distribution of estates—Moneys at joint credit of deceased and another—Trust—Survivorship—Will—Construction—Executor and trustee—Gift—Sale by executor—Undervalue—Jurisdiction of Probate Court.

D. deposited money in bank in the joint names of himself and a daughter, with power in either to draw against it. The daughter never exercised this power, and when D. died she and her co-executor of his will, in applying for probate, included the money in their statement of the testator's property.

Held, that the money in the bank remained the property of D., and did not pass to the daughter on his death.

An executor sold property of the estate for $800, his wife being the purchaser. On the passing of the accounts the Judge of Probate found as a fact that the property was worth $1,800, and ordered that the executor account for the difference.

Held, that, though the Probate Court could not set aside the sale, it had jurisdiction to make such order.

Where by will money was bequeathed to the testator's daughter "to hold and be enjoyed by her while she remains unmarried," with a bequest over in case of her decease or marriage:—

Held, that the daughter was only entitled to the income from the money and not to the possession and disposition thereof.

Remarks on the absence from the record of the decree of the Court of original jurisdiction.

Judgment of the Court below, *In re Daly*, 1 E. L. R. 487, affirmed.

E. L. Newcombe, K.C., and *McKeown*, K.C., for the appellant.

Gregory, K.C., and *Macrae*, for the respondents.

MANITOBA.] [24TH JUNE, 1907.

CANADIAN PACIFIC R. W. CO. v. CARRUTHERS.

Railway—Animals killed on track—Negligence—Railway Act, 1903, ss. 199, 237—Animals at large—Construction of statute—"At large upon the highway or otherwise" — Fencing of railway — Trespass from lands not belonging to owner.

C.'s horses strayed from his enclosed pasture situated beside a highway which ran parallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence, which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.

Held, affirming the judgment appealed from, *Carruthers* v. *Canadian Pacific R. W. Co.*, 16 Man. L. R. 323, 4 W. L. R. 441, that under the provisions of s.-s. 4 of s. 237 of the Railway Act, 1903, the company were liable to damages for the loss sustained, notwithstanding that the animals had got

upon the track while at large in a place other than a highway intersected by the railway.

G. T. Blackstock, K.C., for the appellants.

J. Edward O'Connor, for the respondent.

DAY v. CROWN GRAIN CO. AND CLEVELAND

Mechanics' liens—Completion of contract—Time for filing claim—Construction of statute—R. S. M. 1902 c. 110, ss. 20, 36—Right of appeal.

The time limited for the registration of claims for liens by s. 20 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, does not commence to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder.

Judgment appealed from, 16 Man. L. R. 366, 3 W. L. R. 545, reversed.

DAVIES and MACLENNAN, JJ., dissented, on the ground that the evidence was too unsatisfactory to justify an extension of the time.

The Court refused to quash the appeal on the ground that the right of appeal had been taken away by s. 36 of the statute above referred to.

C. P. Wilson and *A. E. Hoskin*, for the appellant.

A. C. Galt, for the respondents.

McNICHOL v. MALCOLM.

Negligence—Damage to goods of tenant on demised premises—Liability of landlord—Master and servant—Acts in course of employment—Alterations—Damage by steam—Responsibility of contractors—Control of premises—Cross-appeal between respondents—Practice.

In the lease of a shop the landlord agreed to supply steam heating, and, in order to improve the system, engaged

a firm of plumbers to make alterations. Before this work was completed, and during the absence of the tenant, the plumbers' men who were at work in another part of the same building, with steam cut off for that purpose, at the request of the caretaker employed by the landlord, turned the steam on again, which, passing through unfinished pipes connected with the shop, escaped through an open valve in a radiator and injured the tenant's goods.

Held, that the landlord was liable in damages for the negligent act of his caretaker in allowing steam to be turned on without ascertaining that the radiator was in proper condition to receive the pressure, and that the plumbing firm were also responsible for the negligence of their employees in turning on the steam, in such circumstances, as they were acting in the course of their employment in what they did, although requested to do so by the caretaker.

The judgment appealed from, *Malcolm* v. *McNichol*, 16 Man. L. R. 411, 5 W. L. R. 45, was affirmed with a variation declaring the plumbers jointly liable with the landlord.

The action was against the two defendants jointly, and the plaintiff obtained a verdict at the trial against both. The Court of Appeal confirmed the verdict as to McN., and dismissed the action as to the other defendants. McN. appealed to the Supreme Court of Canada, making the other defendants respondents on his appeal.

Held, that the plaintiff, respondent, was entitled to cross-appeal against the respondent defendants, to have the verdict against them at the trial restored.

Appeal dismissed with costs, and cross-appeal allowed with costs.

W. Nesbitt, K.C., *J. A. M. Aikins*, K.C., and *J. B. Coyne*, for the appellant.

F. H. Chrysler, K.C., and *H. Ormond*, for the respondent Malcolm.

C. P. Wilson, for the respondents the Standard Plumbing Co.

RUSTIN v. FAIRCHILD CO.

Contract—Sale of machinery—Agreement for lien—Delivery.

The company sold R. an entire outfit of second-hand threshing machinery for $1,400, taking from him three so-called promissory notes for the entire price. Two days before giving the notes, R. had signed an agreement setting out the bargain, in which the following provisions appeared: "And for the purpose of further securing payment of the price of the said machinery and interest . . . . the purchaser agrees to deliver to the vendor, *at the time of the delivery* of the said machinery as herein provided, *or upon demand*, a mortgage on the said lands (i.e., lands described at the foot of the agreement), in the statutory form, containing also the special covenants and provisions in the mortgages usually taken by the vendors. And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realized, etc., should the vendors take and resell the said machinery . . . and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages, and expenses, and any and all notes or renewals thereof, shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes, and all renewals thereof, and interest, and all costs, charges, damages, and expenses, as herein provided, and, for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands . . . . And, on default, all moneys hereby secured shall at once become due and all powers and other remedies hereby given shall be enforceable." In an action to recover the amount of the notes past due and to have a decree for a lien and charge upon the lands therefor under the agreement:—

Held, reversing the judgment appealed from, that the right of the company to enforce the lien depended upon the

interpretation of the whole contract; that the provision as to the lien only became operative in the case of a complete delivery pursuant to the contract; and that the alternative words "or upon demand" must be taken as meaning upon a demand made after such complete delivery.

W. Redford Mulock, K.C., for the appellant.

C. P. Wilson and *A. E. Hoskin*, for the respondents.

BRITISH COLUMBIA.] [24TH JUNE, 1907.

MORTON v. FULTON.

Constitutional law—Construction of statute—Crown Procedure Act, R. S. B. C. c. 57—Duty of responsible Ministers of the Crown —Refusal to submit petition of right—Right of action—Damages —Pleading—Practice—Withdrawal of case from jury—New trial —Costs.

Under the provisions of the Crown Procedure Act, R. S. B. C. c. 57, an imperative duty is imposed upon the Provincial Secretary to submit petitions of right for the consideration of the Lieutenant-Governor within a reasonable time after presentation, and failure to do so gives a right of action to recover damages.

After a decisive refusal to submit the petition has been made, the right of action vests at once, and the fact that a submission was duly made after the institution of the action is not an answer to the plaintiff's claim.

In a case where it would be open to a jury to find that an actionable wrong had been suffered and to award damages, the withdrawal of the case from the jury is improper, and a new trial should be had.

The Supreme Court of Canada reversed the judgment appealed from, which had affirmed the judgment at the trial dismissing the action, with a variation allowing the plaintiff his costs up to the time of service of the statement of defence, costs being given against the defendant in all the Courts and a new trial ordered.

DAVIES and MACLENNAN, JJ., dissented, and, taking the view that the refusal, though illegal, had not been made maliciously or wrongfully, considered that on that issue the plaintiff was entitled to nominal damages; that in other respects the judgment appealed from should be affirmed; and that there should be no costs allowed on the appeal to the Supreme Court of Canada.

Deacon, for the appellant.

W. Nesbitt, K.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 15TH APRIL, 1907.

MONTGOMERY v. THE KING.

Crown—Tort by Crown's servants—Diversion of flowing water—Liability—Amendment of petition of right.

The suppliant, by his petition of right, alleged, in substance, that the Crown through the Minister of Railways and Canals, and his servants, agents, and employees, having no right to do so, had diverted the water of a certain brook which flowed through the suppliant's property in the parish of Dalhousie, N.B., and used the same for supplying the engines and locomotives of the Intercolonial Railway and vessels in the harbour of Dalhousie.

Upon objections in law to the sufficiency of the petition:—

Held, that the suppliant's action was laid in tort, and that a petition of right would not lie therefor.

Upon an application by the suppliant to amend his petition, the Court declined to grant the same until a draft of the proposed amendments was submitted, and the Court had an opportunity of considering how far it was necessary for the suppliant to depart from his original petition.

Magee, for the suppliant.

E. L. Newcombe, K.C., for the Crown.

[BURBIDGE, J., 22ND APRIL, 1907

REX v. ROGERS.

Crown—Expropriation—Licensed hotel—Special value of premises to owner arising from liquor license—Compensation.

The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but, as the license laws then stood, it could be renewed in favour of the then owner, or, in case of his death, of his widow; but no license could be granted to any other person for such premises. If the owner sold the property it was shewn that the use to which he put it could not be continued.

Held, that, while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation, and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken.

MacIlreith and *Tremaine*, for the Crown.

W. B. A. Ritchie, K.C., and *Tobin*, for the defendants.

REX v. THOMPSON.

Crown—Expropriation—Foundry—Depreciation in value of machinery and tools by reason of expropriation—Compensation.

Where a building used as a foundry is expropriated for the purposes of a public work, the owner is entitled to compensation for the depreciation in value of the machinery, tools, and other personal property with which his foundry is fitted up.

MacIlreith and *Tremaine*, for the Crown.

McKinnon, for the defendant.

REX v. STAIRS.

Crown—Expropriation—Claim for damages to business—Claim for depreciation in value of machinery—Compensation.

Where the whole property is taken and there is no severance, the owner is entitled to compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carries on at some other place.

2. The defendants, in expropriation proceedings, at the time their premises were taken, had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants, and sold for less than it was worth to them when used for such purposes.

Held, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been used.

MacIlreith and *Tremaine,* for the Crown.

Bell, for the defendants.

[BURBIDGE, J., 10TH JUNE, 1907.

SEDGEWICK v. THE KING.

Crown—Public work—Government railway—Injury to the person—Negligence of Crown's servant—Liability.

The suppliant, while waiting on the platform of the Intercolonial station at Stellarton, N.S., to board a train, was knocked down by a baggage truck and injured. The truck was being moved by the baggage master. The evidence shewed that the accident could have been prevented by the exercise of ordinary care on the part of the baggage master.

Held, that, as the injuries of which the suppliant complained were received on a public work, and resulted from

the negligence of a servant of the Crown while acting within the scope of his duties and employment, the Crown was liable therefor.

Judgment for the suppliant for $600 and costs.

Drysdale, K.C., *Mellish,* K.C., and *Sedgewick,* for the suppliant.

MacIlreith and *Tremaine,* for the Crown.

[BURBIDGE, J., 24TH JUNE, 1907.

ARMSTRONG v. THE KING.

Crown—Government railway—Injury to the person—Negligence—Liability of Crown—50 & 51 V. c. 16, s. 16 (c)—Interpretation—Art. 1056, C. C. L. C.—Right of action—Waiver by accepting indemnity.

The provisions of s. 16 (c) of 50 & 51 V. c. 16, now R. S. C. 1906 c. 140, s. 20 (c), not only give exclusive original jurisdiction to the Exchequer Court of Canada to hear and determine claims against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, but impose a liability upon the Crown to answer in such cases for the wrongful acts of its officers or servants.

2. The suppliant's husband, in his lifetime a locomotive engineer employed on the Intercolonial Railway, was killed by an accident on the railway while on duty. The accident happened by reason of a fireman, who was employed on another train belonging to the same railway, failing properly to set and lock a switch in the performance of his duty.

Held, that the case fell within the provisions of s. 16 (c) above mentioned, and that the Crown was liable in damages.

3. *Held,* following *Miller* v. *Grand Trunk R. W. Co.,* [1906] A. C. 187, the result of which is to overrule *The*

Queen v. *Grenier*, 30 S. C. R. 42, that the right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is responsible, is an independent and personal right of action, and is not, as in the English Act known as Lord Campbell's Act, conferred on the representatives of the deceased only; and that a provision in a by-law of a society to which the deceased belonged, and to the funds of which the defendant company subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the company for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action.

Laflamme and *Mitchell*, for the suppliant.

E. L. Newcombe, K.C., for the Crown.

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MONEY TO LOAN on First Mortgage Security on City or Farm Property

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THE
CANADIAN LAW TIMES.

OCTOBER, 1907.

CONTRACTS IN RESTRAINT OF TRADE.

THIS class of cases (says Sir F. Pollock) presents a singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the changed conditions of society and the requirements of modern commerce. It has been untouched by statute, and is simply an instance of what may be called "judicial legislation," a continuous development of a general rule.

"No subject better illustrates the flexibility and expansiveness of the common law than that of covenants in restraint of trade."

Based upon public policy as the doctrine was, it was held originally that all contracts in restraint of trade were bad, on the ground that "to prohibit or restrain any, to use a lawful trade at any time or at any place was against the benefit of the commonwealth."

But, as Mr. Justice Burrough once said, "Public policy is a very uncertain horse, and when once you get astride it you never know where it will carry you."

And obviously "public policy" in regard to matters where no cardinal principles are at stake must vary with time and place. Judges, it has been said, are more to be trusted as interpreters of the law than as expounders of what is called public policy (per Cave, J., Re Mirams, [1891] 1 Q. B. at p. 595). It was well said by Sir George Jessel, M.R.: "It must not be forgotten that you are not to extend

arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." (Printing and Numerical Registering Co. v. Samson (1875), 19 Eq. 462.) One of the earliest cases on the subject is the well-known Dyer's Case (2 H. V. fol. 5, pl. 26). This was an action on a bond in which a dyer had bound himself not to exercise his trade for half a year in the same town with the plaintiff.

Mr. Smith (Contract 214) says—not accurately—that the bond was "held void: and Judge Hull flew into such a passion at the sight of it that he swore on the bench ("with more fervour than decency:" 1 Sm. L. C. p. 418); and threatened to send the obligee to prison till he had paid a fine to the King: upon which Lord Macclesfield observes in Mitchel v. Reynolds (1 P. Wms. 181), that he could not but "approve of the indignation that Judge expressed, though not his manner of expressing it."

"But it soon became clear that the commonwealth would not suffer if a man who sold the goodwill of a business might bind himself not to enter into immediate competition with the buyer; thus it was laid down in Rogers v. Parry that 'a man cannot bind one that he shall not use his trade generally,' 'but for a time certain and in a place certain, a man may well be bound and restrained from using of his trade.'" (Ans., 11th ed., p. 224).

The early authorities on this subject are all collected and discussed in the "famous case" of Mitchel v. Reynolds (1711), 1 P. Wms. 181), by Chief Justice Parker, afterwards Lord Macclesfield. The Chief Justice in his celebrated judgment, while affirming the general rule to be that "in all re-

straints of trade, where nothing more appears, the law presumes them bad," yet pointed out that where the restraint was upon good consideration, and was limited in respect of time or place, and where the contract appeared to be just and honest, it was good.

In that case the defendant had assigned the lease of a bake-house in the parish of St. A., to the plaintiff, for five years, and the defendant had entered into a bond conditioned that he would not exercise the trade of a baker for five years within that parish. The Court held the condition good because it was a reasonable restraint and founded on a good consideration. The Chief Justice said: "The true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2nd, to the public by depriving it of a useful member." "In a great many instances they can be of no use to the obligee: which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle?"

The conditions of validity under this judgment were that the restraint must be partial as to space, must be upon good consideration, and must be reasonable.

Obviously the Chief Justice thought that a general restraint throughout England would be unreasonable and void, and so afterwards thought Best, C.J.: "Any deed by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade, or to act in a profession, in a particular place, proper." (Homer v. Ashford (1825), 3 Bing. 322, 326.)

Many subsequent instances of partial restraints as to space being held good are to be found in the reports, and this was the most usual form of restriction.

"Hence the distinction between general and partial restraints became confused with a distinction between restraints unlimited as to place and restraints unlimited as to time, and it was laid down that a man might not contract himself out of the right to carry on a certain trade *anywhere*, for ten years, though he might contract himself out of the right *ever* to carry on a trade within ten miles of London."

In regard to the factor of consideration, the rule at one time was that to support a condition in restraint of trade the consideration must be an adequate one, and the Courts used to inquire into the adequacy even in the case of contracts under seal.

But this rule was disavowed by the Exchequer Chamber in the case of Hitchcock v. Coker (1837), 6 A. & E. 438, where it was held to be "enough that there actually is a consideration for the bargain, and that such a consideration is a legal consideration, and of some value." See also Graveley v. Barnard, 18 Eq. 518.

Parol evidence is admissible to shew what the consideration was: Cooper v. Southgate (1893), 10 R. 552.

The next important case in relation to this subject is that of the Maxim-Nordenfeldt Gun Co. v. Nordenfeldt, [1894] A. C. 535.

The facts in that most important case were as follows. Nordenfeldt was a maker and inventor of quick-firing and other guns, and ammunition. He sold his business to the company for £287,500, and agreed that for twenty-five years he would cease to carry on, either directly or indirectly, the manufacture of guns, gun-carriages, gunpowder, or ammunition, or any other business liable to compete with such business as the company was carrying on for the time being.

He retained the right to deal with explosives other than gunpowder, in torpedoes or sub-marine boats, and in metal castings or forgings.

After some years Nordenfeldt entered into business with another company dealing with guns and ammunition; the plaintiffs sought an injunction to restrain him from doing so.

The Court of Appeal ([1893] 1 Ch. 630), held: (1) that the covenant not to compete with the company in any business which it might carry on was a general restraint of trade, that it was void, but that it was several and distinct from the rest of the contract; (2) that the sale of a business accompanied by an agreement by the seller to retire from the business, is not a general restraint of trade, provided it is reasonable between the parties, and not injurious to the public.

The covenant was held to be valid as regards the gun and ammunition business.

In this particular case the latter restraint was held reasonable between the parties, inasmuch as Nordenfeldt received a very large sum of money, and was left a very wide scope for the exercise of his inventive faculties.

The special character of the business and the wide area over which it extended required a constraint co-extensive with that area for the protection of the plaintiffs.

It was also held that the agreement was not injurious to the public interest, since it transferred to an English company the making of guns and ammunition for foreign lands.

An appeal from this decision was dismissed by the House of Lords, whose judgment laid down this all-important principle:—The sole test of the validity of a contract in restraint of trade is its reasonableness in the interests of the covenantee, with the proviso that the covenant must not otherwise offend against public policy.

Since this decision "the question is, in *every* case, whether the restraint is reasonable or not."

The judgments in the House of Lords are extremely interesting and should be most carefully perused by students of this branch of the law.

The following brief extracts from the three leading judgments may well be inserted here.

Lord Herschell, L.C., says: "The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee."

Lord Watson says: "A series of decisions based upon grounds of public policy, however eminent the Judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country, in relation to and for promoting the interests of its commerce, must, as time advances, and as its commerce thrives, undergo change and development, from various causes which are altogether independent of the action of its courts. In England at least it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what

is the rule of policy for the then present time. When the rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule, and would, if judicially enforced, prove injurious to the community."

Lord Macnaghten says: "The true view at the present time, I think, is this:—The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

But, simple as the test appears to be in the stating, the complexities of modern business life cause many knotty points to arise for the consideration of the Courts.

The question of reasonableness has been held to be a matter of law for the Court, and not a question of fact for the jury. But the Judge may leave it to the jury to find the facts upon which the question of reasonableness will depend.

The case of Dowden v. Pook, [1904] 1 K. B. 45, is a good illustration of this. Plaintiffs carried on the business of cider merchants and cordial manufacturers. They appointed the defendant to be the manager of one department of their business upon certain terms, and the defendant covenanted with them that he would not "either solely, or jointly with, or as manager or agent for, any other person or persons or company, directly or indirectly, carry on, or be engaged or concerned or interested in the business of a cider merchant,

manufacturing chemist, or cordial compounder, nor permit or suffer his name to be used or employed in carrying on, or in connection with, the said business, for the term of five years after leaving the service of the company."

The defendant was dismissed, and subsequently carried on the business of a cider-merchant. To an action for damages for breach of covenant and for an injunction, the defence was set up that the covenant was void as being in restraint of trade.

At the trial Mr. Justice Grantham left it to the jury to say whether the covenant was wider than was necessary for the protection of the plaintiffs' business; the jury answered in the affirmative.

The Judge, however, on further consideration, thought that the question was one for him to answer, and not for the jury, and gave judgment for the plaintiff for an injunction.

The Court of Appeal held that the question was undoubtedly one of law, for the Court, and not for the jury.

"The question," said Cozens-Hardy, L.J., "is really one of public policy, which is not a question of fact for a jury, but of law for the Judge. No doubt, the Judge who has to decide the question has to consider the particular circumstances of the case. In most cases these probably either would be formally admitted, or would not substantially be in dispute; but of course cases might be imagined, in which it might be necessary, in order to enable the Court, as a matter of law, to say whether a covenant was reasonable, that evidence should be given as to such matters as the nature and extent of the business to be protected; and if such evidence were so far conflicting that a serious issue of fact were raised, it might be proper for the Judge to leave that issue to the jury, if the case were tried with a jury." (Page 54).

"If there had been any substantial controversy as to these matters, there might have been questions of fact for a jury to decide." (Collins, M.R., p. 52.)

The Judges all held that it was "impossible to say that for the protection of a business of this kind, and limited as this business was, it was reasonably necessary that the defendant should be restrained from carrying on business as a cider merchant in any part of the world."

Being thus of the opinion that the covenant must be held to apply to any part of the world and to impose a world-wide restraint, and that the protection was of too wide and sweeping a character for the business of the plaintiffs, the Court held that the covenant sued upon was invalid and dismissed the action.

It is to be observed that in this case the fact that the covenant must be held to apply to any part of the world—"America, for instance, or the colonies"—was thought to be a material factor in regard to its construction. But this point cannot be said to be well settled.

In the Maxim-Nordenfeldt Case, [1893] 1 Ch. 630, p. 651, Lindley, L.J., said: "Our predecessors from whom we inherit this branch of the law, would never have thought it contrary to public policy to prevent a man from assisting foreigners to compete with an English trader who had bought his business; and I am not aware that it has ever been judicially held to be contrary to public policy to give effect to a covenant entered into for such a purpose."

This appears to have been the opinion of Lord Herschell and Lord Macnaghten in the House of Lords.

Lord Herschell said: "I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when this rule was adopted, have scouted the notion that if, for the protection of the vendors of a business in this country, it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and

was being carried on here from setting up or assisting rival buinesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant." (Page 550.)

The question as to whether the inclusion of foreign area is material and capable of rendering the covenant unreasonable came up again before the Court of Appeal in the case of Lamson Pneumatic Tube Co. v. Phillips (91 L. T. R. 363), where the restriction was from engaging for five years in any business similar to that of the plaintiffs "within the limit of the Eastern Hemisphere."

The Court decided the action in favour of the plaintiffs, holding upon the facts of the case that the restraint was not unreasonable. The majority of the Judges in appeal refused to decide the question as to the effect in principle of the inclusion of foreign area. "The question reveals a portentous conflict of judicial opinion, et adhuc sub judice lis est." (Matthews & Adler, p. 123.)

In Chitty on Contracts (1904) the main rules of law on the subject of restraint of trade are summarised as follows:—

1. A restraint is not void unless it extends further than is necessary for the reasonable protection of the party for whose protection it has been agreed to, or is injurious to the public interests of this country, or is agreed to, even though under seal, without a consideration of some legal value.

2. The reasonableness or unreasonableness of any restraint is a question of law for a Court and not in any case for a jury, and the reasonableness depends on all the circumstances, which must be weighed in each case.

3. A restraint, if valid, is enforceable by injunction, notwithstanding a stipulation for payment of liquidated damages in case of breach and the defendant's willingness to pay such damages, etc. (p. 559).

It must be noticed that even if the covenant be reasonable in the interest of the parties, yet it may be held void

as being injurious to the public interest. This is clear from the language of the Judges in many of the cases already referred to.

Turning now from this brief sketch of the state of the English authorities to the cases in the Ontario Courts, it cannot be said that there are many modern cases of special importance to be noted, so far as illustrating different principles are concerned.

The most recent is Anderson v. Ross, 14 O. L. R. 683, a case of much interest as to the construction of the words "carry on or engage or be interested directly or indirectly in business."

The plaintiff and defendant were partners in a jewelry business carried on in the town of Port Arthur. The articles of partnership provided that the plaintiff should procure her husband to work in the business and to devote his whole time and attention to it; and the plaintiff covenanted that her husband should not, after the determination of the partnership, "carry on or engage or be interested, directly or indirectly, in any business in the town of Port Arthur which shall compete or interfere with the business of the defendant." After the dissolution of the partnership, the plaintiff's husband entered into the employment of B., as manager of a jewelry business belonging to B., upon premises in Port Arthur situate in close proximity to the shop at which the defendant was carrying on the business which had been carried on by the partnership; and the business of B. was, beyond question, one which competed with the business of the defendant.

The plaintiff sued for a partnership account, and the defendant counterclaimed for breach of this covenant. The Court held that what had been done by the plaintiff's husband was a breach of her agreement with the defendant.

There is a valuable summary of the numerous English and Ontario cases on the much litigated question as to the meaning of the words "engage" and "interested in" in the

judgment of Meredith, C.J. The learned Judge held that the guiding rule is to construe such a covenant as the one in question so as to carry out the object and intention of the parties so far as the language of the covenant will fairly allow and no further.

Tried by this test, the acts of the husband were a breach of the plaintiff's covenant for which she was liable.

Clute, J., held that "it seems tolerably clear that the rule to be followed is that, while on the one hand, a construction should be given so as to enforce the object of the covenant, yet that such construction should not extend the meaning of the language used beyond its natural import, and that the meaning of the language used is to be gathered from the words of the covenant, as applied to the particular business, having regard to the relation or interest of the parties thereto."

The words "continue to carry on business" formed the subject of an interesting discussion in Carpenter v. Carpenter, 9 O. W. R. 862. The plaintiff and defendant, brothers, were engaged as partners in the business of nurserymen and fruit sellers. Upon dissolving partnership, the plaintiff continued the fruit branch and the defendant the nursery branch, each agreeing that for ten years he would not engage in the kind of business to be done by the other.

The covenant by the defendant was that he would not compete with his brother in the fruit business, provided that the plaintiff should "continue for such time to carry on the fruit business."

Within the ten years the plaintiff entered into an incorporated company and transferred to it his plant and property and goodwill in the business. The company carried on business for two or three years, and was then wound up.

The plaintiff then resumed business as an individual, and brought this action to restrain the defendant from a breach of the covenant in question.

The Court held that the construction of the agreement was that there was a personal engagement for ten years by the

defendant that he would not interfere with the fruit business of the plaintiff, provided that the plaintiff should always during that time continuously carry on as proprietor that business, that the word "continue" meant an uninterrupted course of business or conduct, and that the original business of fruit dealing by the plaintiff did not continue into the incorporation, but had ceased to exist—it had become merged and had disappeared in the assets of the corporation. The plaintiff was therefore held not entitled to enforce the covenant.

With the case of Anderson v. Ross (supra) may be compared the English case of Cory v. Harrison, [1906] A. C. 274, where an attempt was made to push to an extreme extent the meaning of the words "carry on or be concerned or interested in."

The respondent was a coal merchant, carrying on both a home and an export business. He sold the home business to the appellants, and covenanted with them that he would not "solely or jointly with any other person, either directly or indirectly, carry on or be concerned or interested in the coal trade in any part of Great Britain."

He afterwards sold the export business to a company, and took the purchase money in shares. The company afterwards sold the business to a firm, the purchase money being payable to the company by instalments lasting over several years.

The firm having begun to carry on both a home and an export business, the appellants brought an action against the respondent for breach of covenant. It was held that there had been no breach. It could not be said that a creditor was "concerned or interested in" the business of the firm within the business meaning of the words.

To apply the word "interested" to the sense contended for by the appellants would be "to give it an extension which would prove most embarrassing, and indeed impracticable, in the ordinary conduct of business."

The above consideration of restraint of trade has been occasioned by the appearance of the second edition of Matthews on Covenants in Restraint of Trade.

The first edition was published in 1893, in the year before the decision of the Maxim-Nordenfeldt case in the House of Lords. It is therefore time for a new edition covering that case and the numerous subsequent cases on the subject. This edition appears to be a very useful treatise. The leading case is very fully quoted from and discussed, as are also the subsequent cases.

In addition to the criticism of authorities in the body of the book, there is a very useful digest of cases, in which all the cases decided from the date of Mitchel v. Reynolds (1711) down to the present time (22nd June, 1907), are collected with occasional notes.

In addition to this, the authors have included in table A. a collection of words, phrases, and clauses connected more or less with the subject of covenants in restraint of trade which have been the subject of judicial interpretation, with a list of cases and short notes of decisions, and in table B., part I., a list of cases in which the restraint was held valid, and part II., a list of cases in which the restraint was held void.

These three tables will in themselves make the book a very useful one to practitioners. The authors seem to have done their work very fully and carefully, perhaps with almost too great a wealth of quotation and discussion.

They criticise the well settled rule that a consideration is necessary even in instruments under seal, whereby a restraint of trade is created, and argue that, inasmuch as since Hitchcock v. Coker (supra), the Courts will not inquire into the adequacy of the consideration for such covenants, no other rule should be applied than is applied to other contracts under seal which are held not to require a consideration to support them. The line of argument, while ingenious, does not seem convincing, and the discussion does not

appear of much practical importance, for, as is said in Smith's Leading Cases, quoted at p. 68 of the book, "it is so hard to conceive of a reasonable contract of this nature without some consideration, that the precise question seems unlikely to arise."

The habit of referring to cases decided in this century as '07, '04, etc., instead of 1907, 1904, seems objectionable.

There is a useful discussion on a subject which frequently arises for consideration, viz., the divisibility of covenants in restraint of trade (p. 94 et seq.). (See Berry v. Day, 5 O. L. R. 629.)

Toronto. N. W. HOYLES.

The Law of Contracts in Restraint of Trade, Second Edition, by Joseph Bridges-Matthews and Herbert M. Adler, M.A., LL.M., both of the Middle Temple and Oxford Circuit, Barristers-at-Law. London: Sweet & Maxwell; Toronto: The Carswell Co., 1907.

LORD BRAMPTON.

We regret to record the death of Lord Brampton, better known as Sir Henry Hawkins, which took place on the 6th October last.

Henry Hawkins was born at Hitchin, in Hertfordshire, on the 14th September, 1817, the son of Mr. John Hawkins, solicitor, of that town, and received his education at Bedford school. He early devoted himself to law, and for some years before his call to the Bar, in 1843, practised the now extinct science of special pleading below the Bar. He joined the Home Circuit, and, after enjoying a large practice as a junior, received the honour of a silk gown in 1858. His name will always be associated with some of the most striking and memorable trials of his time. In 1858 he was instrumental in procuring the acquittal of Simon Bernard, who was charged as accessory in the conspiracy against the life of Napoleon III. He was also one of a brilliant array of counsel who appeared on behalf of the various defendants in the Overend and Gurney prosecutions, instituted in consequence of the collapse, on "Black Monday," 1866, of that famous house. The prosecution was conducted by the unfortunate Dr. Kenealy. After a trial of nine days a verdict was brought in of "not guilty."

The two causes célèbres, however, in which the late Judge achieved his highest distinction at the Bar were the Tichborne trials and the great will case of Sugden v. Lord St. Leonards. The outlines and main details of the Tichborne case remain unforgotten even after the lapse of a quarter of a century. Perhaps never since the date of Cicero's "Pro Cluentio" was so complicated a story of crime unfolded before a court of justice, and rarely have passions of a more varied character been aroused in large classes of the people by legal proceedings. From first to last the

different trials, beginning with proceedings in Chancery in 1867, extended over a period of nearly seven years. The first trial began before Lord Chief Justice Bovill and a jury on the 11th May, 1871, and was only brought to an end on the 6th March, 1872, when the plaintiff was nonsuited. Lord Coleridge, then Attorney-General, was Mr. Hawkins's leader, and spoke for 26 days. His junior's principal contribution to the trial was his masterly cross-examination of Mr. Baigent. The claimant's story was widely believed, and many who ought to have known better subscribed to "Tichborne bonds" to enable Orton to assert what were believed to be his rights. Mr. Guildford Onslow is said to have lost £15,000 in supporting the claim; and Mr. Whalley, member for Peterborough and a zealous Protestant whose partizanship was not untinged with religious motives, was another of the claimant's chief supporters. The first trial lasted 103 days, after which the plaintiff was indicted for perjury and forgery. The somewhat unusual course was taken of a trial at bar before the late Lord Chief Justice Cockburn and Justices Mellor and Lush. The speeches of counsel and examination and cross-examination of witnesses lasted about 150 days, and the Chief Justice's summing up was carried through the working days of a month—from the end of January to the end of February, 1874. The prisoner was sentenced to 14 years' penal servitude, a sentence which was affirmed by the House of Lords, whither an appeal on questions of law on the indictment was taken in 1881.

The Sugden case was of a very different character. It was probably the most singular instance in the annals of our law of the establishment of a lost instrument by secondary testimony. The late Lord St. Leonards had made testamentary dispositions of extraordinary length and complexity. As the testator was one of the most learned real property lawyers who had ever sat on the Bench, his will and eight codicils were naturally expressed in the most technical language; and the net effect of them was highly unfavourable

to his grandson and successor to the title, and very largely in favour of the ex-Chancellor's daughter, Miss Charlotte Sugden, and his second son, the Rev. Frank Sugden. Miss Sugden was a lady of great ability, and had largely assisted her father in the preparation of his legal treatises, especially the Handy Book on Real Property Law—a concise work, possessing considerable authority in its day. Mr. Hawkins, who appeared with Mr. Inderwick, Q.C., and Dr. Tristram for Miss Sugden and her brother, succeeded in establishing all these testamentary instruments, mainly on the evidence of Miss Sugden.

Election petitions were another element in Mr. Hawkins's multifarious practice; and he successfully defended Mr. W. H. Smith's seat for Westminster before Baron Martin. He was a great advocate rather than a great lawyer, and was rarely heard in the House of Lords or the Privy Council. His powerful and flexible voice, his manner, and the variety of his facial expression gave him an enormous influence with juries; and as a cross-examiner he was seldom, perhaps never, surpassed. Fortunately for his reputation, his career at the Bar was antecedent to the new system, once described by an Attorney-General as one under which it is said to be counsel's main duty not to make speeches but to undergo the cross-examination of the Judge. Few leaders in recent times have had so many opportunities of brilliant display on a great stage. Like other great advocates, Mr. Hawkins was sometimes charged with not reading his briefs, and there was a story that his clerk on one occasion applied for the fee on a brief and received the somewhat tart reply from the solicitor that if the papers were untied the cheque would be found pinned inside. But the marvellous celerity with which the voluminous papers in the Tichborne case were read and digested is a sufficient answer to accusations of indolence. Few Queen's counsel not law officers have, we imagine, equalled Hawkins's income in his best years. His fees were high, and it is said that he helped materially to raise the level of leaders' remuneration—a result, perhaps, of doubtful bene-

fit to the profession at large. At the period of the Holborn-viaduct Compensation cases he is said to have made £22,000 in one year. He only once stood for Parliament, in 1865, when he was Liberal candidate with Mr. Howel Gwyn for Barnstaple. Hawkins was at the bottom of the poll, and the two Conservatives, Sir G. Stucley and Mr. Cave, were returned.

It was no surprise to the profession when, in November, 1876, Mr. Hawkins was raised to the Bench. It cannot be said that Hawkins was a great Judge in the sense in which the term is applied to Lord Wensleydale or to the late Sir G. Jessel; and he was sometimes charged with undue severity in criminal cases. But he was an excellent Judge in Chambers and rapid and accurate in questions of fact. He could also take a strong position unfettered by technicalities, as when in two cases he deprived a successful plaintiff of costs. He had a great knowledge of criminal law, and his services were in almost invariable request in the Court for Crown Cases Reserved; and his views expressed at the trial of prisoners were generally sustained. Hawkins had extraordinary power of work, and on occasion was known to charge a jury on circuit at 10 o'clock at night. But these heroic performances were sometimes in circumstances of place and date which suggested a motive other than pure zeal in the administration of justice. He had been standing counsel to the Jockey Club, of which he was one of the oldest members, and his arrangement of circuit business was sometimes found to be consistent with attendance at the most popular race meetings.

In the vacation after the Michaelmas sittings in 1898 Sir Henry Hawkins retired; and on the 27th January, 1899, he was raised to the peerage under the title of Baron Brampton of Brampton, in the county of Huntingdon. For about three years—until August, 1902—he took an active part in the judicial work of the House, but never appears to have sat in the Privy Council. He was as acute and penetrating as ever, and missed no point of law or argument, and his

judgments were exhaustive to the verge of prolixity. But it must be admitted that in this period, when Lord Brampton was from 82 to 85 years old, he substantially added to his already considerable reputation as a lawyer.

In August, 1904, Lord Brampton published two bulky volumes of Reminiscences. It can hardly be said that they constitute a valuable contribution to legal literature. One might have expected from 60 years' experience of the profession a good deal of instruction as well as of entertainment; but the result was disappointing. The book, in fact, hardly deserves to be called amusing, for many of the stories, told at interminable length, have become somewhat flat and some of them are not free from vulgarity. Years, it would seem, had impaired the accuracy of his memory, for in the account attributed to Sir Richard Bethell (afterwards Lord Westbury) of Lord Campbell's promotion to the Woolsack, the only true statement is that Mr. Hawkins and Bethel were both Benchers of the Middle Temple. The lower tricks of advocacy, prize fights, racing, and gambling occupy an undue share in these recollections of an octogenarian.

Lord Brampton, in the early summer of 1898, was received into the Roman Catholic Church, of which Lady Brampton was a fervent member. He was twice married, the second time, in 1887, to a daughter of Mr. H. F. Reynolds, of Hulme, near Manchester. There were no children of either marriage.—(From *The Times*.)

THE LATEST ONTARIO DECISIONS.*

Assessment and Taxes.]—In Laird v. Neelin, 10 O. W. R. 429, Anglin, J., felt himself constrained by the authorities to hold that non-compliance with the provisions of ss. 140, 141, 142, 143, 150, and 162, was not cured by the provisions of s. 188 of the Assessment Act.——The plaintiffs, an express company, used the wharf, buildings, and offices of the Niagara Navigation Co., at the town of Niagara, jointly with the latter company, during the months of navigation, and paid half of the salary of the agent and clerk in charge during those months. There was no part of the wharf to which they had the exclusive right. While during the fruit season the bulk of the goods were carried by the express company, the business of the navigation company was on the whole much more extensive. It was decided by Mabee, J., that the plaintiffs were not liable to assessment and business tax in respect of these premises, because such premises were not "occupied or used mainly for purposes of its business" so as to bring the case within the provisions of 4 Edw. VII. c. 23, s. 10: Dominion Express Co. v. Town of Niagara, 10 O. W. R. 513.——An appeal by the plaintiffs in Rideau Club v. City of Ottawa from the judgment of Mabee, J., 12 O. L. R. 275, 8 O. W. R. 106, noted 26 C. L. T. 574, was allowed by the Court of Appeal, on the ground that the word "business" in s. 10 of the Assessment Act is used in the narrower sense of a trade or occupation carried on for the purposes of profit, and so does not apply to the plaintiffs: 10 O. W. R. 519.——It is decided by Boyd, C., in Belleville Bridge Co. v. Township of Ameliasburg, 10 O. W. R. 571, that a bridge built on and over the marshes, islands, and navigable waters of the Bay of Quinte, affording a means

* Short notes of the most important cases in Volume X. of the Ontario Weekly Reporter, Nos. 15, 16, 17, 18, 19, 20, 21, pp. 409 to 604, inclusive.

of passage from the Belleville side to the mainland belonging to the township of Ameliasburg, and so used as not to interfere with navigation and other public uses of the bay, and to which the public has a right of access only on payment of the statutory toll, is liable to assessment, and this, in spite of s. 37 of the Assessment Act, although the structure is over a mile in length.

Building Contract.]—An appeal by the defendant in Mills v. Small from the judgment of Riddell, J., 9 O. W. R. 893, noted ante 437, was dismissed by a Divisional Court: 10 O. W. R. 499.

Company.]—An appeal by the plaintiff in Deacon v. Kemp Manure Spreader Co. from the judgment of Anglin, J., 9 O. W. R. 965, noted ante 438, was dismissed by a Divisional Court, on the ground that the relief asked—an injunction to restrain the defendants from acting under a voluntary winding-up order, alleged to have been obtained by fraud and collusion—was beyond the jurisdiction of the Court, the Ontario Winding-up Act providing by an appeal to the Court of Appeal the means whereby orders and decisions of a County Court Judge may be reviewed: 10 O. W. R. 577.

Costs.]—An appeal by the defendants in Hamilton v. Hamilton, Grimsby, and Beamsville Electric R. W. Co., from the order of Falconbridge, C.J., 10 O. W. R. 197, noted ante 508, was dismissed by a Divisional Court: 10 O. W. R. 473.——A local registrar is held by Mabee, J., in Re Drinkwalter and Kerr, 10 O. W. R. 511, to have no jurisdiction under R. S. O. 1897 c. 121, s. 30, to tax a mortgagee's costs. The authority to tax conferred by this section is to the local Master and to the taxing officers of the Supreme Court of Judicature. The local registrar is not a taxing officer of the Supreme Court of Judicature, although under Rule 84 he is a taxing officer of the High Court of Justice.

County Court Appeal.]—The provision in s. 57 of the County Courts Act, R. S. O. 1897 c. 55, that an appeal from the judgment of a County Court to a Divisional Court must be set down for the first sittings of a Divisional Court commencing "after the expiration of one month from the judgment, order, or decision complained of," is held by a Divisional Court in Allan v. Place, 10 O. W. R. 603, to mean after the expiration of one month from the pronouncing of judgment if delivered in open Court, otherwise after the expiration of one month from the time the parties are notified of it. The dictum of Armour, C.J., in Fawkes v. Swayzie, 31 O. R. 256, is approved. See also Maxon v. Irwin, 10 O. W. R. 537, noted post, p. 697.

Covenant in Restraint of Trade.]—Gratuitously assisting a person to raise money and otherwise to purchase and carry on a hotel business, in which the person so assisting has no pecuniary interest in any way, not done fraudulently or colourably, is held by Falconbridge, C.J., in Fricker v. Borman, 10 O. W. R. 564, not to be a breach of a covenant that such person shall not directly or indirectly carry on or be engaged in such a business within certain specified limits.

Criminal Law.]—Rulings of the Court of Appeal in Rex v. Armstrong, 10 O. W. R. 508, are that a child ignorant of the nature of an oath may be instructed for the purposes of a trial; that the question of competency is one to be determined when the witness is brought forward to testify; and that being satisfied as to that, the Court cannot reject the child's testimony under oath.——In Rex v. Harrison, 10 O. W. R. 578, the return to the writ of certiorari in aid of habeas corpus (see 10 O. W. R. 35, ante 511), was never filed in the High Court, nor were any of the papers which were returned with it, nor was the writ, neither had these papers been brought back to the custody of the clerk of the peace when the judgment was pronounced; they were apparently yet in the hands of one of the officers of the

High Court. An appeal from an order refusing a reserved case on the point whether the authority of the Court in which the prisoner was tried was and continued superseded by that of the High Court until the latter should convey authority to the inferior Court to proceed, was dismissed by the Court of Appeal, who considered a conviction in the County Judge's Criminal Court, in which the defendant was tried, to be very different from a conviction by a justice of the peace, such Court being a Court of record and as such expressly excepted from the provisions of the provincial Habeas Corpus Act.——Upon an indictment for robbery and wounding, the jury found the defendants not guilty of robbery, but guilty of assault, and the verdict was recorded as one of guilty of "the assault as charged." The Court of Appeal directed the Judge before whom at the Quarter Sessions the defendants were tried to state a special case for the opinion of the Court, owing to doubts whether the verdict of the jury was rightly recorded, and whether it was rightly interpreted and acted upon by the learned Chairman of the Sessions, who had sentenced the defendants respectively to 30 months and 18 months in the Kingston penitentiary: Rex v. Edmonstone and New, 10 O. W. R. 581.

Damages.]—Upon an appeal by the plaintiff in Dewey v. Hamilton and Dundas Street R. W. Co. from the judgment of Riddell, J., 9 O. W. R. 511, noted ante 378, a Divisional Court ordered a new trial unless the parties should agree to a reduction of the damages to $500, in which event there should be judgment for the plaintiff for this amount: 10 O. W. R. 535.

Deed.]—Facts found by Anglin, J., in Stevenson v. Cameron, 10 O. W. R. 432, were that the plaintiff never intended to convey a strip of land which was in question, and that the defendant Flannigan, who acted as the agent of the defendant Cameron, and by whose acts and knowledge the latter was bound, was aware from the outset that the plaintiff intended to reserve this strip, being of opinion that she had

no right to convey it. It being admitted that the plaintiff was very ill at the time and not quite fit to transact business, that the deed in question was prepared by the solicitors of the defendants, and that the plaintiff was without independent advice, the deed was ordered to be reformed by excluding this strip from the lands thereby conveyed.

Division Court Appeal.]—It is decided by a Divisional Court in Maxon v. Irwin, 10 O. W. R. 537, that the meaning to be ascribed to s. 158 of the Division Courts Act, which provides for an appeal "within two weeks after the date of the decision complained of," is that such appeal shall be launched within two weeks from the delivery of judgment, if delivered in open Court, otherwise within two weeks after notification thereof to the appellant. See also Allan v. Place, 10 O. W. R. 603, noted ante, p. 695.

Division Courts.]—An appeal by the defendant in Re Boyd v. Sergeant from the order of Riddell, J., 10 O. W. R. 377, noted ante 599, was dismissed by a Divisional Court: 10 O. W. R. 521.

Easement.]—An appeal by the plaintiff in Simpson v. T. Eaton Co. from the judgment of Britton, J., 10 O. W. R. 215, noted ante 556, was allowed by a Divisional Court, which held that the trial Judge erred in applying to the case the rules settled by the Courts in the case of interference with ancient lights, whereas here the plaintiff's rights depended upon conveyance to him by the common owner of the lot in question and the adjoining lot now owned by the defendants, the grant by express terms covering the access of light as appurtenant or quasi-appurtenant, and being, moreover, subject to the well-established rule that one cannot derogate from his own grant: 10 O. W. R. 569.

Habeas Corpus.]—It is decided by Riddell, J., in Re Bartels, 10 O. W. R. 553, that, the very basis of a writ of habeas corpus being the allegation that the person to whom

the writ is directed is unlawfully detaining another in custody, a prisoner who by escaping discharges himself from custody before judgment is given, waives all his rights under that writ; and this is so even where he again comes into the custody of the sheriff after judgment has been reserved, since the judgment ought to be pronounced which would have been pronounced at the time judgment was reserved, and that, in such case, a new writ may be ordered to issue, and this although the 15 days mentioned in s. 23 of c. 155, R. S. C. 1906, have elapsed, the enactment in question not being intended to diminish and not diminishing the rights of the prisoner, but being intended to extend and extending them.

Infant.]—A Divisional Court agreed with Riddell, J., in Louden Manufacturing Co. v. Milmine, 9 O. W. R. 829, noted ante 440, that the letter written by the defendant after majority was not a ratification sufficient to satisfy the statute, but held that the plaintiffs were entitled to leave to amend by setting up an alternative claim for the value of the goods in the defendant's hands at majority, and were entitled to succeed upon that claim to the extent of $75: 10 O. W. R. 474.

Injunction.]—Warren v. D. W. Karn Co., 10 O. W. R. 516, was an action to restrain the defendants from publishing as advertisements certain testimonials or recommendations in a garbled form. The circumstances were that these had been given for the joint work of the defendants and the plaintiff, when their superintendent in the construction of church organs, and they were used by the defendants, after the plaintiff had left their employment and was conducting a rival business, so as to exclude the plaintiff from mention. Boyd, C., while condemning the use made of these testimonials, was unable to find any ground of legal liability, and dismissed the action, but without costs.

Life Insurance.]—A provision in a certificate of life insurance that the proceeds thereof should be paid to the ex-

ecutors of the insured upon his death, to be by them put at interest, the interest to be paid to the wife of the insured for the benefit of herself and children, and, in the event of her death or of her marrying again, to be paid to his children until the youngest should become of age, when the principal should be equally divided among them, was held by Riddell, J., in Re Shafer, 10 O. W. R. 409, following In re McKellar, 21 C. L. T. Occ. N. 381, which he considered binding upon him, not to have the effect of vesting in each child, as he or she reached his or her majority, the portion of the corpus coming to such child, as the same provision in a will would have done.

Limitation of Actions.]—A Divisional Court in Segsworth v. DeCew, 10 O. W. R. 575, held that the Statute of Limitations was a bar to the action, both because the writing relied upon to take the case out of the statute, there being several other matters of account between the parties, may have referred to other things, and because the words "we would like as well as you to have this account paid" did not amount to a plain admission of liability.

Liquor License Act.]—An order for the forfeiture and destruction of liquors is held by the Court of Appeal in Rex v. Ing Kon, 10 O. W. R. 544, not to be a necessary part of a conviction under the Liquor License Act, and, as a consequence, the opinion is expressed that s. 121 of this Act gives an informant no appeal from an order made by a Divisional Court quashing a magistrate's order for forfeiture and destruction.

Lunatic.]—In Re Gibson, 10 O. W. R. 542, upon an appeal from the order of Teetzel, J., on the return of a writ of habeas corpus, remanding the appellant to the custody of the superintendent of the Mimico asylum for the insane, the Court of Appeal directed an issue to try the question of the insanity of the appellant; the decision of the appeal to await the result of such issue.

Mines and Minerals.]—An appeal by the plaintiffs in La Rose Mining Co. v. Temiskaming and Northern Ontario Railway Commission from the judgment of **Mabee**, J., 9 O. W. R. 513, noted ante 381, was dismissed by the Court of Appeal: 10 O. W. R. 516.

Municipal Corporations.]—In Re Village of Newburgh and County of Lennox and Addington, 10 O. W. R. 541, it appeared that the Napanee river was, at the point where it was intersected by a highway, divided by an island into two channels, one 38 feet in width and the other 80 feet in width. A Divisional Court, affirming a finding that the county corporation were required wholly to maintain these bridges, held that s. 613 of the Consolidated Municipal Act refers to the width of the river and not to the length of any particular bridge, and that the two channels mentioned being together over 100 feet in width, the matter is thereby concluded.

New Trial.]—It is decided by the Court of Appeal in Brenner v. Toronto R. W. Co., 10 O. W. R. 547, reversing the decision of a Divisional Court. 9 O. W. R. 198, noted ante 192, directing a new trial on the ground of misdirection, in an action for personal injuries sustained by the plaintiff by being struck by one of the defendants' cars, that an alleged remark of the trial Judge (probably a mere slip) not made in the presence of the jury, that the defendants' rules had nothing to do with the case, the charge itself making clear in the opinion of the Court exactly the bearing of these rules upon the matter in issue, was not a misdirection which would warrant a new trial being ordered. The question of "ultimate negligence" elaborately dealt with in the judgment of the Court below is not passed upon by the Court of Appeal.

Partnership.]—The plaintiffs in Codville Georgeson Co. v. Smart, 10 O. W. R. 466, claimed priority as creditors of on ostensible partnership known as "W. & J. Smart," over

Margaret Green, an execution creditor of William Smart, in the following circumstances. A business was carried on by William Smart under the name of W. & J. Smart. John Smart, whose name was used, was an infant, and was not actually a partner in the business of W. & J. Smart, but he was held out as such, and credit was, with his knowledge and assent, secured by holding him out as a partner, and he would have been liable but for his infancy. It was decided by Anglin, J., that the principle that a separate creditor is excluded from ranking upon assets of his debtor employed in the business of an ostensible partnership, until the claims of creditors of the ostensible partnership are satisfied, was applicable to this case.

Pleading.]—Upon an appeal by certain of the defendants in Armstrong v. Crawford from the order of Riddell, J., 10 O. W. R. 381, noted ante 602, a Divisional Court gave the defendants Thomas Crawford and S. R. Clarke leave to amend by asking for any relief they desired against the plaintiff, and any relief they desired against their co-defendants by way of counterclaim as consequent on the matters pleaded in connection with the plaintiff's claim, and directed that if these defendants did not chose so to amend, the appeal should be allowed: 10 O. W. R. 534.

Principal and Agent.]—In Cavanagh v. Glendinning, 10 O. W. R. 475, an action for agents' commission upon the sale of mining lands, which turned largely upon the deductions of fact to be made upon the evidence, Boyd, C., had given judgment for the plaintiffs, but only for the sum of $1,500, calculated at 5 per cent. on a cash payment made by the purchaser of $30,000, it being contended that the plaintiffs were to receive a commission only upon the purchase money actually paid, and that at 5 per cent. instead of, as asserted by them, 10 per cent. upon the whole purchase money of $250,000. A Divisional Court, on appeal by the plaintiffs, set aside this judgment and ordered a new trial. The Court of Appeal, Meredith, J.A., and Riddell, J., dis-

senting, held that, on the evidence, the plaintiffs were entitled to a commission of 5 per cent. upon the whole purchase money, reduced owing to difficulties in connection with the title to $230,000, and that there had been no abandonment by the purchaser Hanson, and that the deal as eventually consummated with his assignees, who really stood to him in the position of mortgagees, was only a continuation of the original contract entered into with him.

Promissory Note.]—The erasure of the word "renewal" from a promissory note was held by a Divisional Court in Maxon v. Irwin, 10 O. W. R. 537, not to invalidate the note in the hands of a holder in due course, the alteration not being apparent within the meaning of s. 145 of the Bills of Exchange Act.

Railway.]—It is decided by the Court of Appeal in McKay v. Wabash R. R. Co., 10 O. W. R. 416, that a railway train, having stopped once at the distance semaphore, on approaching a grade crossing over another line, is not bound by s. 226 of the Railway Act (now s. 278 of R. S. C. 1906 c. 37), to stop again, so long as the home semaphore (that immediately at the crossing) is not in the meantime turned against it. A rule that, "unless there is an interlocking plant in operation, trains must stop and receive proceed signals from the signalman before passing over a drawbridge or a railway crossing at grade," is held to be nothing more than a paraphase of s. 226.——The decision of the Court of Appeal in Grand Trunk R. W. Co. v. City of Toronto and Canadian Pacific R. W. Co. v. City of Toronto, 10 O. W. R. 483, affirming the judgment of Anglin, J., 6 O. W. R. 852, is an important one, but chiefly perhaps from the magnitude of the interests involved. The main ground upon which the plaintiffs asserted a right to the relief they sought was want of jurisdiction in the Railway Committee of the Privy Council to order them to construct and maintain over their respective lines of railway a bridge extending from the south side of Front street southward in the line

of Yonge street to the waters of Toronto bay. This contention, denied by the trial Judge and by the Court of Appeal, was based upon the proposition that Yonge street is not a street or highway upon or along or across which any portion of the plaintiffs' railways is constructed.

Reprieve.]—Rex v. Capelli, 10 O. W. R. 443, is of interest because it is the first reported case of the exercise of the power given to a Judge by s. 1063 of the Criminal Code to reprieve a prisoner under sentence of death, for such period beyond the time fixed for the execution of the sentence as should be necessary for the consideration of the case by the Crown.

Sale of Goods.]—The point is decided by a Divisional Court, Riddell, J., dissenting, in Bell v. Goodison Thresher Co., 10 O. W. R. 445, that, the plaintiffs and defendants having entered into a subsequent agreement ancillary to one for the purchase by the plaintiffs from the defendants of a threshing engine, that the same should be returned to the defendants that the latter might put it in proper working order, as they by such ancillary agreement undertook to do, the plaintiffs relying upon the defendants' judgment, knowledge, and skill in the matter as manufacturers, an express warranty in the original agreement could not be invoked to exclude an implied warranty in what subsequently took place between the parties as to such engine.——In Brown v. Dulmage, 10 O. W. R. 451, it appeared that the plaintiff had agreed to purchase a stock of goods from the defendant, and had paid $1,000 on account of the purchase money. Subsequently he attempted to rescind the contract, which he had no right to do. The plaintiff had not made subsequent payments or given notes as called for by the agreement, and was not entitled to possession of the goods. The defendant, having called upon the plaintiff to complete his purchase and remove the goods, upon the default of the latter proceeded to sell them. In the circumstances, a Divisional Court, Britton, J., dissenting, decides

that the plaintiff could not succeed in an action against the defendant for damages for the conversion of the goods, and could not recover back the purchase money or the part thereof paid down. Whether the plaintiff upon tender of the balance of the purchase money could bring an action of trover is not decided.

Security for Costs.]—An appeal by the plaintiffs in Toronto Cream and Butter Co. v. Crown Bank of Canada from the order of Mabee, J., 9 O. W. R. 718, noted ante 385, reversing the order of the Master in Chambers, 9 O. W. R. 543, was dismissed by a Divisional Court: 10 O. W. R. 521.

Settlement of Actions.]—The decision of Anglin, J., in McLeod v. Crawford and McLeod v. Lawson, 10 O. W. R. 590, upon a motion to compel certain of the parties to carry out the terms of an agreement for the settlement of the actions, and to convey certain mining lands to the Lawson Mine Limited, may be summarized in his own words: "In my opinion, I have not jurisdiction, upon this summary motion, after final judgment has been entered in the action, to pronounce a judgment or order for the enforcement of the unperformed terms of this compromise (the validity of which is denied)—terms not covered by such final judgment —terms which the parties have not agreed, and apparently did not intend, should be made a rule or judgment of the Court in these actions—and, above all, terms which were not included in the relief claimed in the actions themselves, and are not such as are 'within the ordinary range of the Court in such an action,' and in enforcing which the Court 'must adjudicate upon equities distinct from those appearing on the records.'"

Street Railway.]—An appeal by the plaintiff in Hackett v. Toronto R. W. Co. from the judgment of a Divisional Court, 10 O. W. R. 25, noted ante 516, was dismissed by the Court of Appeal: 10 O. W. R. 582.

Vendor and Purchaser.]—By the terms of his offer to purchase, the plaintiff was to pay for certain property $100 as a deposit, $1,400 at the time of closing, give a second mortgage for $4,000, and assume a mortgage already upon the property, and time was declared to be of the essence of the offer. On the day appointed for closing he sent a draft conveyance to the solicitor for the defendant, to be executed by the defendant, accompanied by a letter in which he said: "Immediately you notify me that the same is executed, I am prepared to pay over the purchase money at once. I understand that Mrs. Anderson at present resides in Austin, Texas, and I tender this to you as her solicitor and agent in this province." In the circumstances, Riddell, J., thought it quite clear that the plaintiff did not intend that the purchase should be completed on the day named, and dismissed the plaintiff's action for specific performance: Foster v. Anderson, 10 O. W. R. 531.

Writ of Summons.]—The decision of the Master in Chambers in Eastwood v. Harlan, 10 O. W. R. 460, is to the effect that a stenographer employed by a company, who, in the absence of the officers of the company, is in charge of the company's office on instructions of the secretary, is a "clerk" within the meaning of Rule 159 upon whom service of a writ of summons on behalf of the corporation may be made.

CASES FROM WESTERN CANADA.*

Alimony.]—Following the Ontario cases, Newlands, J., in Leib v. Leib (N.W.P.), 6 W. L. R. 392, holds that a wife guilty of adultery, though subsequent to her desertion by her husband, is not entitled to alimony.

Attachment of Debts.]—It is decided by the full Court in Salander v. Jensen (Y.T.), 6 W. L. R. 401, that, by virtue of Rule 294, the affidavit to lead an attaching order under Order 32, Rule 382, must contain a statement of the grounds for the belief of the deponent that the proposed garnishee is indebted to the defendant or judgment debtor.

Constitutional Law.]—It was decided by Newlands, J., in Withey v. Francomb (N.W.P.), 6 W. L. R. 390, that the provision of the Mechanics' Lien Ordinance giving a lien a preference over a mortgage to the amount of the increased value of the property, conflicting as it does with the Land Titles Act, 1894, was ultra vires of the legislature of the North-West Territories, and was, therefore, not continued in force by the Saskatchewan Act.

Contract.]—Breaches of warranty were held by Wetmore, J., in Riches v. Town of Wolesley (N.W.P.), 6 W. L. R. 372, not to be a bar to the plaintiff's recovery upon a contract to construct a bridge, for which he was to be paid $5 a day and board, and the price of a railway ticket to Winnipeg and return, the contract being in its nature one that was divisible, so that the defendants were confined to their counterclaim for damages.

Evidence.]—In Gwillim v. Dawson Electric Light and Power Co. (Y.T.), 6 W. L. R. 437, where the plaintiffs sued

* Short notes of the most important cases in Volume VI. of the Western Law Reporter, No. 3, pp. 309 to 444, inclusive.

for the value of professional services, it was sought by the plaintiffs to have a commission issued to take the evidence of the plaintiff Gwillim at Vancouver, where he then resided, though when the contract was made all the parties resided in the Yukon. It was urged that the fact of Mr. Gwillim practising alone at Vanvouver would put him to inconvenience if he attended the trial; but Dugas, J., considered that the plaintiffs having sued in the Yukon and thereby chosen the jurisdiction, such inconvenience was not to be taken into consideration under the more strict rule applying to the case of a plaintiff seeking to give his own evidence by commission.

Judgment.]—The plaintiffs in Canadian Bank of Commerce v. Syndicat Lyonnais du Klondyke (Y.T.), 6 W. L. R. 424, sued upon a promissory note made by the defendant syndicat in favour of the defendant Barrett, and by him transferred to the plaintiffs. The syndicat counterclaimed against the plaintiffs and the defendant Barrett for damages for fraud and deceit in the sale of the property for which the note was given. Barrett did not appear in the action, though he defended himself upon the counterclaim. Judgment at the trial was given against the syndicat on the note and against Barrett on the counterclaim. A supplemental judgment for the purpose of working out this judgment was also pronounced, but before it was issued, and without notice to Barrett, there was engrafted upon it a postscript that the plaintiffs should have judgment against Barrett for an amount stated. There was no affidavit of non-appearance, or material to shew upon what grounds this was done, and neither the trial Judge nor the plaintiffs' counsel could remember how it came about. Also it was inconsistent with the terms of the supplemental judgment. At the instance of Barrett, the judgment in favour of the plaintiffs was as against him set aside by Craig, J., the trial Judge, as being unwarranted and against good faith, and this although it was contended on behalf of the

syndicat that since they had entered into a settlement on the basis of Barrett's liability, instead of prosecuting an appeal, Barrett was estopped from having the judgment set aside.

Mines and Minerals.]—It was held by the full Court in Jones v. Joyal (Y.T.), 6 W. L. R. 407, that in spite of s. 23 of the Mining Act, a person may stake a bench or hill claim on the right of a creek and afterwards another bench or hill claim on the left of the same creek, without any sale or abandonment, the bench or hill on one side of the creek being a different bench or hill from that on the other.

Mortgage.]—Wetmore, J., holds in Imperial Elevator Co. v. Jesse (N.W.P.), 6 W. L. R. 381, that execution creditors, who have registered their executions against the lands of a mortgagor before the registration of a second mortgage to the plaintiffs, are proper parties to an application, by originating summons, for an order for foreclosure; that an irregularity in the affidavit upon which the summons was issued, consisting in its being intituled only against the defendant, the mortgagor, was cured, under Rule 306, by the appearance in answer to the summons of counsel for such execution creditors; and that the case was within Boez v. Spiller, 2 W. L. R. 280, and the execution creditors had no interest in the lands as against the plaintiffs' mortgage.

Railway.]—The plaintiff in Bird v. Canadian Pacific R. W. Co. (N.W.P.), 6 W. L. R. 393, sought to recover damages for personal injuries sustained while attempting to cross the defendants' railway at a crossing established by them, which, however, was not at a public highway or one sanctioned by the Board of Railway Commissioners. The highway passed some distance to the east, but, because it went through the defendants' yard and crossed several tracks, it had never been opened by the defendants, and was not used to any extent by the public. It was held by Newlands, J., that, the highway not being public, there was no

statutory obligation to fence this crossing under ss. 242 and 243 of the Railway Act, and that, in the circumstances, there was not such negligence in the omission to fence it as would render the defendants liable.

Resulting Trust.]—The evidence of the plaintiff in Dudgeon v. Dudgeon and Parsons (B.C.), 6 W. L. R. 346, was to the effect that, being engaged from early morning until late at night, he made his wife the custodian of his wages, and, having arranged for the purchase of the property in question, left it to his wife to carry it out, and furnished her with further sums to make payments on account of the purchase money; that he became aware of the fact that she had taken the deed in her own name, but was satisfied so long as she had it. Her evidence was that the property was intended to be hers to be disposed of as she thought fit. Irving, J., accepting the evidence of the husband rather than that of the wife, which he considered went too far, held that it sufficiently rebutted the presumption that this property was a gift to the wife arising from the relationship of husband and wife, and established a resulting trust from the wife, to whom the conveyance was made, to the husband, who furnished the money.

Statutes.]—The Miners' Lien Ordinance, which provides that any person who performs any work or service upon or provides any wood to be used in the working of any placer or quartz mining claim shall have a lien for the price thereof, is held by the full Court in Sidback v. Field (Y.T.), 6 W. L. R. 309, not to create a lien for work or material, though furnished after the Ordinance came into force, under a contract made before.

Trial.]—It is decided by the full Court in Marks v. Marks (B.C.), 6 W. L. R. 329, Martin, J., dissenting, that, in the circumstances of that case, the fact that the trial Judge dispensed with the reading in extenso of the evidence of the plaintiff taken on commission did not constitute a

mistrial. The matter is held to be one of discretion. Mr. Justice Martin's dissent is based on the view that there had been really no trial because the plaintiff's counsel at the trial was not allowed to present his case.

Will.]—In Marks v. Marks (B.C.), 6 W. L. R. 329, the plaintiff and defendant both claimed a sum of money bequeathed by the testator "to my wife." Many years before he married the defendant, who lived with him and was recognized as his wife, it was alleged that he had married the plaintiff. It was shewn that about the time the will was made, the deceased was in correspondence with the plaintiff, whom he addressed as "Dear Annie," subscribing himself "your friend," while to the defendant he wrote as "my dear wife" and subscribed himself "your loving husband." This, it was considered, sufficiently indicated who was designated by the words used.

DECISIONS FROM THE COURTS OF QUEBEC AND THE MARITIME PROVINCES.*

Assessment and Taxes.]—A learned judgment by Mr. Recorder Weir in City of Montreal v. Montreal Street R. W. Co. (Que.), is reported in 3 E. L. R. 440. The plaintiffs sued for arrears of assessments due on motive power, lands, buildings, poles, wires, and rails of the defendants. The action was based upon the valuation roll prepared annually by the city assessors, and containing the civic appraisement of all immovable property in the city. The Recorder referred to the Quebec Acts 62 V. c. 58, s. 361, 63 V. c. 49, s. 2, art. 375 of the Civil Code, and to numerous decisions and authorities, and decided that the poles, wires, rails, and "motive power"—which was explained to mean the engines, boilers, condensors, and electric dynamos, used to distribute the motive power—as well as the lands and buildings, were immovables and assessable as such.

Canada Temperance Act.]—An information for an offence against the Canada Temperance Act may be laid before one justice only: Rex v. Hennessy and Clark, Ex p. Pallen, Ex p. Durick (N.B.), 3 E. L. R. 427. This decision was arrived at not without doubt on the part of some members of the Supreme Court, and, according to McLeod, J., it may be considered as overruling Ex p. Sprague, 31 N. B. R. 236, and Ex p. White, 34 N. B. R. 333.——Down by the sea questions of law are still debated upon demurrer, or the Judicature Act equivalent. In Townshend v. Beckwith (N.S.), 3 E. L. R. 501, the plaintiff, an hotel keeper, sued the defendants, two justices of the peace, for signing a search warrant and order under the Canada Temperance Act for the destruction of liquors, by virtue of which a

* Short notes of the most important cases in Volume III. of the Eastern Law Reporter, Nos. 9 and 10, pp. 425 to 536, inclusive.

quantity of liquors, the property of the plaintiff, were taken and destroyed. The defendants pleaded the information for the search warrant sworn to before them, and the conviction of the plaintiff for keeping liquors for sale in violation of the Act, and the making of the order for destruction. The plaintiff replied that the justices had no jurisdiction to grant the search warrant, because no prosecution for a penalty had been commenced before them against the plaintiff, and because the information did not prove cause of suspicion, nor set out particulars of the offence. The "points of law" thus raised were argued before the full Court, and an exhaustive judgment was delivered by Graham, E.J. The sections prohibiting the keeping of intoxicating liquors for sale in counties in which the Act is in force are ss. 99 and 100 of the original Act, and the sections providing for the seizure and destruction of liquors so kept for sale are ss. 108 and 109 as substituted by the amending Act of 1888. It was contended for the plaintiff that the defendants could not take the information for and grant the warrant to search and seize the liquors before an information had been first laid for the penalty imposed for keeping them for sale; and also that the information for the search warrant was insufficient to give the justices jurisdiction. Graham, E.J., said: "Inasmuch as the keeping for sale of liquors is prohibited, and a violation is usually committed in secret and under circumstances rendering it ordinarily difficult to say beforehand what the precise offence is, the statute permits, instead of the ordinary requisite statement in an information of a specific offence, an allegation of suspicion that the liquors are kept for sale on the premises of a person, in order that by means of a search and seizure it may be discovered whether any and what offence is being committed—and, if liquors illegally kept for sale are found there, to secure their forfeiture and destruction. And, in order to give notice to the owner and have the question tried, there is the ordinary justices' summons on information served upon him, which, after trial, if the justices

decide against him, results in an order for the forfeiture and destruction of the liquors, and a conviction for . . . keeping these liquors for sale. There is but one trial. . . . The search warrant is to precede the information. . . . The liquors which the justices would order to be forfeited and destroyed as the result of the trial . . . would be the same . . . which the accused is, as the result of the same trial, convicted of keeping for sale, and which had been seized and brought before them in pursuance of the search warrant." Insufficiency of the information was also contended for. The reason for suspicion stated was that the informant had been told by persons who had purchased liquor from the premises of the accused that liquor was there kept for sale. It was held that in stating suspicions it must have been contemplated that hearsay should be used; but at any rate that if the justices made a mistake in acting upon hearsay in the information it did not affect their jurisdiction so as to make them liable in trespass. The Court also held that another defence to the action, that the order for forfeiture and destruction of the liquors had not been quashed, was a good defence in law.

Certiorari.]—The power of the Court to grant a certiorari was questioned in Rex v. O'Brien, Ex p. Roy (N.B.), 3 E. L. R. 425. An information was laid against Roy under s. 530 of the Criminal Code, R. S. C. 1906 c. 146, for unlawfully destroying a line fence. On the trial before a justice, objection was taken that he had no jurisdiction because the title to land came in question. The objection was overruled, and a conviction made. Roy appealed under s. 749 of the Code to a County Court Judge, and the appeal was entered for hearing, but dismissed, on the ground that it had not been perfected, without consideration of the merits. Upon a motion, on the return of a certiorari, to quash the conviction, the principal point argued was whether or not the right to grant a certiorari was taken away by s.

1122 of the Code. The full Court held that the title to land came in question, the magistrate's jurisdiction was ousted, and the County Court Judge had no jurisdiction to rehear, and therefore the appeal to him did not stand in the way of the Court proceeding upon certiorari to quash the conviction—which it accordingly did.

Contract.]—Dominion Iron and Steel Co. v. Dominion Coal Co. (N.S.), 3 E L. R. 512, was an action for breach of contract for the supply of coal. A very large amount was involved, and the trial lasted three weeks at a special sitting before Longley, J. The opinion as printed is not perhaps of general interest from a legal standpoint; it contains findings of fact and reasons in law to sustain a judgment for the plaintiffs, with a reference as to damages.

Costs.]—The decision of Saint-Pierre, J., in City of Montreal v. Montreal Light, Heat, and Power Co. (Que.), 3 E. L. R. 484, is based upon provisions of the Montreal city charter, and is perhaps not of general interest, but the result may be worthy of brief mention. The action was brought to recover the amount of a judgment for damages obtained against the plaintiffs by a person who was injured by falling into an excavation in the city, and the costs of both parties of the action in which the judgment was obtained. The fault was held to be that of the defendants in the second action, and they were condemned to pay the amount awarded as damages in the first action, but not the costs claimed. Saint-Pierre, J., invoked the authority of Gagne v. Hall, 20 Rev. Leg., and held that "whilst the city is entitled to recover the sum of $61, representing the amount of damages awarded in the original suit, it is only entitled to claim such costs as it has incurred up to the time when the company defendant might have been called into the (original) case as its warrantors."

Defamation.]—Moran v. O'Regan (N.B.), 3 E. L. R. 456, was in its facts singularly like Puterbaugh v. Gold Medal

Manufacturing Co., reported in the Court of Appeal in 7 O. L. R. 582, 3 O. W. R. 535. The declaration stated that the defendant "falsely and maliciously published of the plaintiff in a letter addressed to the plaintiff and dictated by the defendant to his stenographer and transcribed on a typewriter and signed by the defendant and mailed through the post to the plaintiff," the words set out, which in effect accused the plaintiff of theft. The only publication was to the stenographer. The defendant pleaded privilege, setting out the confidential relations between him and his stenographer, and the plaintiff demurred to the plea. The demurrer was allowed by the full Court; Hanington, J., dissenting for reasons similar to those adopted by the Divisional Court in the Puterbaugh case, 5 O. L. R. 680, 2 O. W. R. 398. The majority of the Court felt bound by the decision of the English Court of Appeal in Pullman v. Hill, [1891] 1 Q. B. 524, as did the Ontario Court of Appeal in Puterbaugh's case. Tuck, C.J., said: ".The letter . . . was not written in the ordinary course of the business of a merchant, but was entirely outside of it. In it he accuses the plaintiff of theft, and threatens to expose him. It was no part of his usual business to write such a letter. When he gave it to a clerk in his office to copy, that was a publication, and the occasion of such publication is not privileged."

Evidence.]—A letter from the superintendent of a railway to the third vice-president containing a report of an accident by which a train left the rails, was held in Shea v. Halifax and South-Western R. W. Co. (N.S.), 3 E. L. R. 431, not admissible against the defendant railway company in proof of negligence causing the accident in which the plaintiff was injured.

Limitation of Actions.]—The difficult question, when does the statute begin to run in favour of the mortgagor in possession against the mortgagee? was considered by the full Court in Stevens v. Jeffers (N.B.), 3 E. L. R. 471. J., the father of the defendant, purchased and went into posses-

sion of the land in question in 1878. In 1879 he mortgaged it, and in 1880 conveyed the equity of redemption to B. without consideration. In 1887—within 20 years of the commencement of the action—at the request of and for the benefit of J., his sister, the plaintiff, paid and took an assignment of the mortgage, and B., at the request of J., conveyed the equity to the plaintiff. J. continued in possession until his death in 1903, when he was succeeded by his son, the defendant, who remained in possession until after the action was begun. Neither J. nor the defendant ever paid any rent or anything on account of the mortgage. The plaintiff recovered a verdict in ejectment, which was sustained by the Court. Tuck, C.J., was of opinion that the time commences to run in favour of the mortgagor when he ceases to recognize any right in the mortgagee; J. recognized this right in 1887. Hanington, J.,: "I think that, under the circumstances of this case and the facts as they are found by the jury, a right of entry accrued to the plaintiff when she paid the mortgage at the request of and for the benefit of the mortgagor, and took a deed of the equity of redemption from his trustee at his request, and therefore that her remedy is not barred. The principle of the judgment in Anderson v. Anderson, 37 N. B. R. 432, governs this case."

Negligence.]—In Shea v. Halifax and South-Western R. W. Co. (N.S.), 3 E. L. R. 431, the doctrine of res ipsa loquitur was invoked because the injury on account of which the plaintiff sued was caused, whether proximately or not, by the defendants' train upon which he was a passenger leaving the rails. The principal judgment in the full Court was delivered by Longley, J., who was of opinion that the doctrine did not apply, as it would in the case of a collision, and he held that the plaintiff had not established negligence; but if this opinion was wrong, and the onus was on the defendants to rebut the presumption of negligence, he considered that they had done so; and, moreover, that the plaintiff

was guilty of contributory negligence in jumping from the car, which when it left the track did not turn over but only canted; no passenger who remained in his place was hurt, and no passenger except the plaintiff jumped.

New Trial.]—The extraordinary circumstance that, after repeated efforts and several adjournments of motions by both parties against the judgment at the trial, the Court en banc had not succeeded in compelling the stenographer who took down the evidence at the trial to furnish a complete transcript of it, compelled the Court to direct a new trial of the action of Bourque v. Record Foundry and Machine Co. (N.B.), 3 E. L. R. 481. In directing a trial de novo the Court stipulated that the case should go down precisely in all respects as if there had been no previous trial, and made no order as to the costs of any of the proceedings.

his father, after he had been raised to the Bench. Mr. Henry James Moncreiff, who was appointed a Judge of the Court of Session in Scotland, with the title of Lord Wellwood, in 1888, succeeded his father in 1895 in the peerage as the second Lord Moncreiff.

Marriage with Deceased Wife's Sister.

The two leading articles in our last issue dealt with certain phases of church law and with the presumed conflict between the law of the land and the law of the church which arises upon the passing of the Act permitting marriage with a deceased wife's sister, more particularly with reference to the refusal of clergymen to celebrate marriages permitted by the statute. The other matter which is being discussed is excommunication, and thereanent the London Law Times has this to say: "Exception has rightly been taken to the announcement which has been made by some clergymen of their intention to refuse to administer the Holy Communion to any person who shall have contracted marriage with a deceased wife's sister. The right of a parishioner to receive the Holy Communion is a statutory one, conferred by the Act of 1 Edw. VI. c. 1, s. 8, which, whether declaratory of the law or not, provides 'that a minister shall not, without lawful cause, deny the sacrament to any person that will devoutly and humbly desire it.' What is a 'lawful cause' was considered in the case of Jenkins v. Cook, 34 L. T. R. 1, 1 P. D. 80, where it was held that a clergyman was not justified in refusing the sacrament to a parishioner of irreproachable character who had written a book containing religious views which did not commend themselves to the clergyman. A fortiori, it would seem, would such a refusal be unjustifiable in the case of a person who is merely exercising the right given by the new Marriage Act to contract marriage with his deceased wife's sister? Such a refusal might be visited with punishment under the Church Discipline Act, 1840, under which the proceedings in Jenkins v. Cook were taken, or under the Act of 1 Edw. VI. c. 1. In this connection refer-

ence may be made to the case of Swayne v. Benson, 6 Times L. R. 7, where a clergyman was held liable, under the Act of Edw. VI., to censure and suspension for refusing the sacrament to a lady whose only offence apparently consisted in having attended a Wesleyan place of worship. The case of marriage with a deceased wife's sister is a much stronger one than that of Jenkins v. Cook, which involved the consideration of controversial matter, whereas here there is a clear statutory right to do what these clergymen would contend is unlawful."

Selected Bar Anecdotes.

WHERE THEY WERE BEST.—In the course of a recent case before Mr. Justice Darling, the Judge declined to make a requested ruling, saying that if he did so the Court of Appeal would say he was wrong. Counsel having expressed disagreement with this view, the Judge said: "Well, you know the Court of Appeal as well as I do, perhaps better, for you see them at work, while I only meet them at luncheon." To which the barrister dryly replied: "Your Lordship sees them at their best."

NOT LAW.—In a jury trial in New York recently the attorney for the defendant started in to read to the jury from a certain volume of the Supreme Courts reports. He was interrupted by the Court, who said:

"Colonel ———, it is not admissible, you know, to read law to the jury."

"Yes, I understand, your Honour; I am only reading to the jury a decision of the Supreme Court."

Recent American Decisions.

Carriers.—A railway company is held, in McKibbin v. Wisconsin C. R. Co. (Minn.), 8 L. R. A. (N.S.) 489, not to be, as matter of law, liable only as a gratuitous bailee of baggage regularly checked and afterwards destroyed by fire

while in its station house, although the passenger did not go on the same train with the baggage.

A street car company which carries a passenger beyond his announced destination, in a strange place, on a dark night, and refuses to carry him back, but compels him to leave the car, is held, in Kentucky & I. Bridge & R. Co. v. Buckler (Ky.), 8 L. R. A. (N.S.) 555, to take the risk of his injury in attempting to follow the directions of the conductor to walk back along the track, which course will take him past obstructions from which injury may result to him.

A passenger who went upon the platform of a car when his station was called, so as to be ready to alight, was held, in Turley v. Atlanta, K. & N. R. Co. (Ga.), 8 L. R. A. (N. S.) 695, not to be chargeable with negligence, as matter of law, where, when the train slowed down but failed to stop, he attempted to alight to avoid being carried beyond his destination, and was thrown to the ground by a sudden jerk of the train, and injured.

Gift.—The delivery of a cheque as a gift *causa mortis* to a person other than the donee, but for his use and benefit, and with instructions to deliver the same to the donee, is held, in Varley v. Sims (Minn.), 8 L. R. A. (N.S.) 828, to be a sufficient delivery to pass title, although it does not reach the hands of the donee until after the donor's death.

Injunction.—The right of a merchant to an injunction against the maintaining, in front of his place of business, by a labour union, of pickets bearing placards which tend to intimidate his employees, patrons, and customers, with the intent to do so for the purpose of compelling him to pay the prices fixed by the union to his union employees, is sustained in Goldberg, B. & Co. v. Stablemen's Union (Cal.), 8 L. R. A. (N.S.) 460.

Insurance.—The surrender by a reinsured to the reinsurer of its covering note on the day before the insured property has, without the knowledge of either party, been injured by

fire, upon the request of the reinsurer that the risk be placed elsewhere, being made under a mistake of fact, is held, in Traders Ins. Co. v. Aachen & M. F. Ins. Co. (Cal.), 8 L. R. A. (N.S.) 844, not to relieve the reinsurer from liability for existing loss. The liability of a reinsurer is the subject of a note to this case.

Master and Servant.—A wrongfully discharged employee is held, in Carmean v. North American Transp. & T. Co. (Wash.), 8 L. R. A. (N.S.) 595, to have no right to maintain successive actions for wages accruing during the remaining term of the contract, since one recovery is held to bar further action.

Negligence.—A person who employs a livery team with a driver to carry him to a specified place is held, in Cotton v. Willmar & S. F. R. Co. (Minn.), 8 L. R. A. (N.S.) 643, not to be chargeable with the negligence of the driver in driving upon a railway track without taking proper precautions to ascertain the approach of a train. With this case is a note reviewing the other authorities on imputed negligence of driver to passenger.

Subrogation.—To enforce the right of subrogation, it is held, in Parsons v. Urie (Mo.), 8 L. R. A. (N.S.) 559, that equity will annul an attempted extinguishment of a mortgage by the holder upon being paid the amount due with money borrowed by a portion of the mortgagors, who, in the mortgage, have covenanted to pay the debt, and who have refused to consent to the extinguishment of the mortgage, the extinguishment being sought merely to further the interests of persons who have purchased at execution sale the interest of one of the original mortgagors and who will be fully reimbursed, even though the mortgage is not extinguished.

BOOK NOTICES.

Matthews and Adler's Law Relating to Covenants in Restraint of Trade. — Second Edition, by Joseph Bridges Matthews and Herbert M. Adler, both of the Middle Temple and Oxford Circuit, Barristers-at-law. London: Sweet and Maxwell, Limited: 1907.

This is reviewed in the course of a leading article, ante.

Godfrey's "Shavings."—A Semi-Legal Medley (Part I.) by J. J. Godfrey, of Osgoode Hall, Toronto, Barrister-at-law, and of the Bar of British Columbia. Toronto: Arthur Poole & Co.: 1907. ($1.)

We regret to learn that Mr. Godfrey died (very suddenly) on the 26th August last, while this little book was in press. It is full of sparkling epigrams and musings on things legal and semi-legal, in prose and verse. All lawyers who have a literary side—and there are many—will like to have it on their shelves.

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THE
CANADIAN LAW TIMES.

NOVEMBER, 1907.

VENDOR AND PURCHASER.

IT is somewhat strange that at this late date there should be any question as to what are the legal rights of a vendor and purchaser in regard to the enforcement of a contract for the sale of land. Where the conveyance of the land and payment of the purchase money are to be contemporaneous transactions, it is perfectly clear that the vendor cannot get his money unless he conveys the land, nor can the purchaser get the land unless he pays his purchase money. But let us assume that the contract is under seal and there is a covenant to pay the purchase money by instalments, and the land is not to be conveyed until the last payment shall have been made. May the vendor in such a case proceed and collect all the purchase money by action, notwithstanding that he still holds the land which is the consideration of the contract—in other words, will the Court give him judgment for the purchase money without also providing for the transfer of the land? In the case of Vivian v. Clergue it was recently held by a Divisional Court that a judgment may in such circumstances be properly obtained for an instalment of the purchase money as it falls due. On behalf of the defendant it was contended that, as the vendor had not conveyed the land, he was not entitled to recover any part of the purchase money qua purchase money, except by way of an action for specific performance, but his legal remedy was restricted to a right to recover damages for breach of contract, and these damages would not necessarily be the amount of the purchase money contracted to be paid, but

simply the loss the vendor proves he has sustained by reason of the breach of the contract, taking into account the fact that he retains the property which was the subject of the sale. The case of Laird v. Pim, 7 M. &. W. 474, was relied on as supporting this conclusion. On the other hand, it was argued on behalf of the vendor that the contract for payment of the purchase money was not dependent on the conveyance of the land, and that it was the express contract and stipulation of the parties that the purchase money should be paid in instalments before any conveyance could be required, and therefore it was said there was, according to the doctrine of Pordage v. Cole, 1 Wms. Saund. 548, a legal right to recover the several instalments in full as they fell due, though no conveyance had been made. We are inclined to think that the rights of a vendor and purchaser to enforce contracts of this kind are, as contended by the defendant, two-fold, viz., by an action at common law, on the contract, in which only damages for its breach would be recoverable, or an action in equity for specific performance. An action by a vendor for specific performance, we may remark, is merely another form of action to recover the purchase money, but in framing its decree for specific performance the Court of Chancery, before the Judicature Act, never included any mandatory order for the payment of purchase money; but the decree was framed in this way, viz., that upon payment according to the terms of the contract, the vendor should convey the lands, and in default of payment, either that the lands should be sold and the proceeds applied in payment of the purchase money and costs, and ordering the purchaser to pay any deficiency, thus giving the plaintiff damages for the breach; or it might provide in case of default that the contract should be rescinded, which latter provision would operate as a virtual foreclosure of the rights of the purchaser in the lands, and in that case the vendor would appear to have no further rights under the contract. Where a vendor formerly obtained a judgment at law for the amount of his purchase

money, and subsequently rescinded the contract, he would be restrained in equity thereafter from enforcing his judgment: Cameron v. Bradbury, 9 Gr. 67; followed in Gibbons v. Cozens, 29 O. R. 356. Thus equity agreed with the decision of the common law Court in Laird v. Pim, that a vendor could not have both the land and the purchase money. Now, we may inquire, what are the rights of a vendor under the Judicature Act? It is clear he is no longer required to seek legal and equitable relief in different Courts. He may now, it is equally true, enforce all his remedies in the same Court, and that Court is competent to give him both legal and equitable relief so far as they are not inconsistent; but, though the same Court now administers both kinds of relief, the fundamental principles on which such relief is granted remain unaltered, except to the extent hereafter pointed out. If the vendor elects to seek a legal remedy only, he must get the remedy which a Court of law would formerly have afforded him, and substantially in the way which a Court of law would formerly have given it him, provided it was not inconsistent with any rule of equity; and if, on the other hand, he seeks an equitable remedy, he must get it substantially in the way in which the former Court of Chancery would have given that remedy, and where the remedies granted at law and in equity as to the same subject matter were inconsistent, we think the principle on which equity granted relief must now prevail.

The Divisional Court in the case in question gave no written opinion, but simply affirmed the judgment of Britton, J., 10 O. W. R. 186, for the reasons given by him. The Divisional Court does not pretend to dispute the authority of Laird v. Pim; it holds that it does not apply to all cases, and that one of the cases to which it does not apply is the case where the purchase money is payable by instalments. We think, however, that the rule in Laird v. Pim has been taken in England, of late years, to be an universal rule applicable to all cases of actions for purchase money or any part of it, where the land has not been conveyed.

It is to be regretted that the Divisional Court did not see fit to give a considered judgment on the question, as we venture to think the law is by no means clear on the point. No doubt, many of the cases referred to in the notes to Pordage v. Cole, 1 Wms. Saund. 319, seem to justify the conclusion of the Divisional Court, as do also Wilks v. Smith, 10 M. & W. 355, and Mattock v. Kinglake, 10 A. & E. 50, referred to by Britton, J.; but the question is whether they are consistent with Laird v. Pim, 7 M. & W. 474, and if not whether the latter case is not founded on the better reason.

The cases supporting the judgment of the Divisional Court turn upon the fact that a covenant for payment of purchase money may in certain cases be regarded as independent of the vendor's covenant to convey the land, and where that is the case the covenant for payment of the purchase money may be enforced at law, though the vendor still retains in himself the title to the land which is the consideration for the purchaser's covenant.

Williams in his notes to Pordage v. Cole says that the Judges founded their construction of the dependency or independency of covenants or agreements "on artificial and subtle distinctions without regard to the intent and meaning of the parties;" see 1 Wms. Saund. 320b; and it may well be doubted whether rules of construction thus arrived at are intrinsically sound.

The case of Laird v. Pim seems to lay down a rule in accordance with both common sense and natural equity, that a vendor cannot have both his land and the price. No one can doubt either the justice, or wisdom, of that rule. Therefore, when it is sought to invade that rule and make the distinction that, though true it is you cannot recover your purchase money if you have not conveyed the land, where the payment and transfer are to be contemporaneous, yet if the purchaser has promised to pay the purchase money in instalments, you may do so. That appears to us

an altogether "subtle and artificial distinction," with all due respect to the opinion of the Divisional Court. And we think that, in spite of "all subtle and artificial distinctions," where a contract for the sale of land is entered into, no matter how the payment of the purchase money is agreed to be made, in substance and in fact the payment of the purchase money is dependent on the performance by the vendor of his part of the contract. To treat them as independent agreements, to pay money on the one hand, and convey land on the other, is doing violence to the real and true intent of the parties; and, with great respect for those who think differently, altogether alien to the modern system of administering justice, and altogether contrary, we believe, to the true intent and meaning of the Judicature Act. See Judicature Act, s. 57 (1), (6), (7), (8).

This question of a vendor's rights at law is intimately bound up with his right to sue in equity. On what ground can a vendor come into equity to obtain specific performance of a contract for the sale of land? If he could recover his purchase money at law, prima facie there would be no ground for his coming into equity. Fry, no mean authority on the subject, places the ground of his right to come to equity on the fact that he cannot recover at law the full purchase money, but merely damages for breach of contract: Fry on Specific Performance, s. 72. Mayne, in his work on Damages, is equally clear: "Actions against the vendee of land for refusal to complete his contract stand on exactly the same footing as actions for not accepting goods: Laird v. Pim, 7 M. & W. 474. In one case the plaintiff, in an action of this sort, seems to have recovered the whole purchase money: Hawkins v. Kemp, 3 East 410. But it is now decided that that is not the correct rule. 'The plaintiff cannot have the land and its value too.'"

The question of whether the foundation of equity jurisdiction in favour of a vendor is the inadequacy of the legal remedy, or the fact that a purchaser is entitled to relief

in equity, and therefore the right should be mutual, is learnedly discussed in an article in 41 Am. Law Reg. 65, which is referred to by Fry.

It will be there seen that in some of the United States a purchaser has a right to recover at law his whole purchase money, and not merely damages for a breach, but in others, what the writer regards as the "now settled law in England" prevails, viz., that his only right at law is to recover damages for breach of the contract; and therefore the only way to recover the whole price is by action for specific performance.

If this be, as we believe it is, the "well settled law of England," we see no sound reason why it is not equally the law in Ontario, and if so, then it follows that where a vendor seeks to recover his purchase money in an action in Ontario, the action should be treated not as a common law action, but an action for specific performance, and the judgment to be pronounced should be as in an action of that character, and not one for the mere payment of money. It will thus be seen that we do not dispute that a vendor may recover the purchase money; all we contend for is that if he claims to do so before he has actually conveyed the land, he can only do so on those terms which a court of equity deems to be equitable; where the purchase money is payable by instalments the form of judgment may be seen in Holmested & Langton's Forms, No. 890, a precedent which we understand from the compilers of that work is taken from the decree pronounced by Blake, V.-C., in the case of Holt v. Curtis, 15th October, 1879.

But we will go further—we will assume that the Divisional Court correctly interpreted the law as to the vendor's legal right, and we will assume that the equity jurisdiction in aid of a vendor is not founded on the fact of the inadequacy of the legal remedy: there is still this fact to be reckoned with, that both the Courts of law and Courts of equity had concurrent jurisdiction to give a vendor relief, and that

the rules of equity as to the terms on which that relief should be granted differed from those of the Courts of law; but, since the Judicature Act, wherever this difference existed the rules of equity are now to prevail. Therefore, however we look at the decision in Vivian v. Clergue, we are compelled to the conclusion that it is erroneous.

LORD BRAXFIELD AND JOHN CLERK.

In certain respects the latest addition to the series of Notable Scottish Trials, the volume concerned with the trial of Deacon Brodie, is one of the most interesting that as yet has appeared. In saying this, we refer not so much to the strange story that it unfolds of the double life led by Brodie, although, as the late Robert Louis Stevenson recognized when, in conjunction with W. E. Henley, he made it the subject of a play, this has its extraordinarily dramatic features—we refer rather to the fresh light it throws on two notable men, each of whom, the one on the Bench and the other at the Bar, played a conspicuous part in the trial; we mean Lord Braxfield, the Lord Justice-Clerk who presided, and John Clerk, afterwards Lord Eldon, who was counsel for Smith, the prisoner indicted along with Brodie for the burglary committed at the Excise Office, Edinburgh, in March, 1788.

Of no Scottish Judge of a bygone day have so many anecdotes come down to us as of Braxfield. His coarseness alike of speech and habits, his undoubted abilities, his merciless treatment of prisoners arraigned before him—a practice which has gained for him the appellation of the Jeffreys of Scotland—are all mirrored in the pages of such books as Cockburn's Memorials of His Time; and as the prototype of Weir of Hermiston he lives anew in the wondrous pages of Stevenson's magnificent torso. In the State Trials one can obtain a fair notion of his methods of browbeating the unhappy wretches who, having had the temerity to advocate Parliamentary reform for Scotland at a time when that country lay under the domination of Dundas, incurred his wrath and suffered at his hands. A majority of the members of the Scottish Bar of that day shared his political views, and consequently looked with no critical eye on his performances

in these trials; but there were still some who refused to bow the knee to Dundas, and who looked with horror on Braxfield's judicial methods, especially when they were exercised to crush out the political aspirations of the people. Few men at the Bar could stand up to the Judge, lacking as they did his powers of invective, and not being gifted, like him, with an overbearing, tyrannizing nature. Occasionally, however, he met his match, and certainly in John Clerk he encountered an adversary whose abilities were as great as his own, and who did not shrink from speaking out his mind even in the presence of so redoubtable and terrible a personage as Braxfield. It is in illustration of this characteristic of Clerk's that the book we have referred to, The Trial of Deacon Brodie, is of extreme interest. Prior to the publication of the volume, it was, of course, well known that Clerk was of a singularly pugnacious temperament, looking upon the Judges as his natural enemies, and espousing the cause of his clients with a vehemence and zeal that not infrequently outran discretion; but our information on these heads has been mainly derived from notices of him in various anecdotal works rather than from actual first-hand records of his forensic combats. Now, however, practically for the first time, we are presented with a transcript of one of his speeches which fully confirms all we have heard of his irrepressible zeal and his contempt for the utterances of the Bench, even when presided over by such a man as Braxfield.

Clerk's speech to the jury in defence of Smith in this trial, with the numerous interpolations of the Judges, occupies nearly eight pages, and in reading it, one is struck by the amazing audacity with which he, a young advocate of only three years' standing, flouted the Bench and defied them practically at every turn. Braxfield's attitude was certainly not conciliatory. The trial had been going on all day, and it was in the small hours of the morning when Clerk began, only to be greeted, after a few opening observations, with the remark from Braxfield: "Be short and concise, sir, at this

hour of the morning." Somewhat later in his address the fiery young advocate was proceeding to denounce two witnesses who had turned King's evidence, and against whose admissibility he and Erskine, who appeared for Brodie, had unsuccessfully contended. "Gentlemen," he declared, "you have heard a variety of objections stated to the admissibility of their evidence—all of which has been overruled by the Court. But, notwithstanding the judgment of their Lordships, I must adhere to these objections and maintain that they ought not to have been admitted as witnesses. Gentlemen, I think a great deal of most improper evidence has been received in this case for the Crown."

The report goes on as follows:—

"The Lord Justice-Clerk: Do you say that, sir, after the judgment which the Court has pronounced? That, sir, is a most improper observation to address at the outset to the jury.

"Lord Stonefield: It is a positive reflection on the Court.

"Lord Hailes: It is a flat accusation that we have admitted improper evidence.

"Lord Eskgrove: I never heard the like of this from any young counsel at the beginning of his career at this Bar.

"The Lord Justice-Clerk: With these admonitions, go on, sir; proceed, sir."

Further on, Clerk maintained that the jury were to judge of the law as well as the facts, whereupon Braxfield says: "Sir, I tell you that the jury have nothing to do with the law, but to take it simpliciter from me."

"Mr. Clerk: That I deny."

"Lord Hailes: Sir, will you deny the authority of this High Court?

"Mr. Clerk: Gentlemen of the jury, notwithstanding of this interruption(!), I beg to tell you, with all confidence and

all respect, that you are the judges of the law as well as the facts. You are the judges of the whole case.

"The Lord Justice-Clerk: You are talking nonsense, sir.

"Mr. Clerk: My Lord, you had better not snub me in this way. I never mean to speak nonsense.

"The Lord Justice-Clerk: Proceed; gang on, sir."

Clerk had not advanced much further when he was again pulled up by Braxfield, and then he resumed his speech, with the utmost contempt for what had fallen from the Judges, with the remark: "Gentlemen of the jury, I was just saying to you, when this outbreak on the Bench occurred, that you were the judges of the law and of the facts in this case." That provoked Braxfield almost beyond endurance, and, after some further wordy warfare, Clerk said that he would not go on unless he was allowed to proceed in his own way, whereupon Braxfield intimated that he would charge the jury, and he was about to do so when up jumped Clerk, shook his fist at the Bench, and ejaculated: "Hang my client if ye daur, my Lord, without hearing me in his defence!" The reporter states that "these remarkable words produced the greatest sensation in Court; the Judges retired to the robing-room to hold a consultation, but, on their returning to Court, the Lord Justice-Clerk merely requested Mr. Clerk to proceed with his speech." Clerk then continued without further interruption, although his very first sentence was a reiteration of his objection, both as to the admissibility and to the credibility of the two witnesses he had been denouncing.

From the piquant narrative which enshrines these and various other wordy duels between Clerk and Braxfield, we have picked out only a few specimens. One is bound to admit that the conduct of Clerk is altogether indefensible, but, this notwithstanding, one reads it with a kind of unholy joy at finding a man, and a young man, too, who was not afraid of, but could boldly do battle with, the terrible Braxfield. This

was the first, but by no means the last trial of strength between the two men; and it laid the foundation of Clerk's professional success, for men admired his pluck. In that quality he was never lacking; in genuine ability few of his contemporaries could compare with him; and if only he could have added judgment, he would have ranked high on the roll of Scotland's greatest advocates. Therein he was lacking, and, lacking that, he failed to reach the highest fame. (From the *London Law Times.*)

RECENT CASES FROM THE TIMES LAW REPORTS.*

Bills of Exchange.]—The meaning of "fictitious or non-existing person" in the Bills of Exchange Act (R. S. C. 1906 c. 119, s. 21, s.-s. 5) is again considered in Macbeth v. North and South Wales Bank, 24 T. L. R. 5, where the test laid down by Lord Herschell in Vagliano's case is applied, viz., that where the drawer of a cheque puts in the name of a payee who he intends should receive payment by himself or some transferee, the case does not fall within this section of the Act. The plaintiff gave to one White a cheque payable to a man named Kerr, or order, so that White could obtain from Kerr some shares of stock which he represented he had arranged to purchase. Kerr, though he existed and was intended by the plaintiff to receive the money, had no shares of stock and knew nothing of the transaction. White forged Kerr's name on the indorsement, and deposited the cheque in the defendant bank, who received payment from the plaintiff's bank. The action was for conversion, and the plaintiff was held entitled to recover, as Kerr was not "a fictitious or non-existing person," and the cheque could not, therefore, be treated as payable to bearer.

Charity.]—In re Sidney, Hingston v. Sidney, 24 T. L. R. 34, it was argued that a gift by will for such charitable uses or for such emigration uses as the executors should in their discretion think fit, could be supported as being of general public utility, but Mr. Justice Swinfen Eady was not prepared to say that any emigration from England was for the benefit of the community, and held that the gift was too vague, and not a good charitable gift.

Contract.]—Newman v. A. and S. Gatti, 24 T. L. R. 18; is an interesting case on contract. The plaintiff was by writ-

* Including cases in Vol. 24, Nos. 1 to 3, inclusive.

ten contract engaged by theatrical managers to understudy the principal actress for the run of a certain play, and the principal actress having left the theatre, the plaintiff claimed the right to play the part. This was refused, and the action was for damages for breach of contract. Evidence as to the meaning of the word "understudy" was given, which shewed that the word did not, in the ordinary usage of the stage, cover the right of the understudy to play the part of the principal, the obligation and right of the understudy being simply to be ready to do so if called upon. This the Court of Appeal held to be the true construction of the contract, and the action failed.

Costs.]—In an action of waste the Judge who tried the action without a jury found that the acts complained of were ameliorating waste, and gave judgment for the defendant, but deprived her of costs, because, in his opinion, she should have approached the landlord before making the changes. On appeal it was held that there were no materials upon which the Judge could exercise his discretion by making the order he did as to costs—and that an appeal would lie without leave where the Judge had not really exercised his judicial discretion at all: Edmund v. Martell, 24 T. L. R. 25.

Distress.]—An interesting question as to a landlord's right of distress is raised in Challoner v. Robinson, 24 T. L. R. 38. A superior landlord (the defendant) distrained upon a number of pictures in the possession of an underlessee (the plaintiff) for rent due by the head lessee. The plaintiff was the proprietor of a club, for which he undertook all the liabilities, and from which he received all the profits, though the management of the club was in the hands of a committee. One of the objects of the club was to promote the sale of pictures by the club members, and a commission of 10 per cent. on all sales was retained by the club, which belonged to the plaintiff. The management of the pictures was vested in the committee. Only members, their guests, and persons

invited, were admitted. The action was for an injunction to restrain the lessor from proceeding with the distress. The Court, however, held that the case did not fall within the only exception to the general rule which was material to the case, namely, " things delivered to a person exercising a public trade to be . . . managed in the way of his trade," and that the exemption of the goods from distress could not be supported.

Injunction.]—In what were considered grave circumstances, an injunction was granted in Stevens v. Stevens, 24 T. L. R. 20, restraining a son from entering his mother's house.

Malicious Breach of Duty.]—The rule that one acting within his legal rights does not incur liability from having been actuated by indirect motives, is illustrated by the case of Davis v. Mayor, etc., of Bromley, 24 T. L. R. 11, in which it is held that an action would not lie against a local authority for their refusal to approve certain plans submitted to them by the plaintiff for the drainage of his house. even if there were evidence to shew that the members had been actuated by bitterness or other indirect motives against the plaintiff.

Statute of Frauds.]—In Lavalette v. Riches and Co., 24 T. L. R. 2. the defendants alleged by counterclaim an oral agreement that they should be the sole agents in Great Britain for the sale of the plaintiff's patent magneto igniter, until the plaintiff's patent should be taken over by a company. The patent would not expire until 1916. The effect of the contract was found to be that the defendants were to be the sole sellers of the plaintiff's device until the expiration of the patent—subject to the condition that the contract was to be determined if the plaintiff sold his rights to a company, and it was held that the contract was within the Statute of Frauds, being an agreement not to be performed within a year, and was, therefore, unenforceable.——Mr. Justice

Channell decides in Davis v. Phillips Mills and Co., 24 T. L. R. 4, that the sending by a purchaser to a vendor through the post of a cheque, which was returned as soon as it reached the vendor's hands, is not a payment which takes the case out of s. 4, s.-s. 1, of the Sales of Goods Act, 1893 (R. S. O. 1897 c. 338, s. 12), so as to make good a verbal contract for the sale of goods over the value stated in the Act, but that the payment, to satisfy the statute, must be made to and be accepted by the vendor.

THE LATEST ONTARIO DECISIONS.*

Charge on Land.]—The plaintiff in Patching v. Ruthven, 10 O. W. R. 620, was given by his wife's will $30 per month and the right to occupy a certain house, on condition of his conveying to the defendant, his step-daughter, certain real estate standing in the joint names of the husband and wife. By a deed expressly made in consideration of the "directions" in the will, he conveyed his interest in this real estate to the step-daughter. In the action he sought to establish a charge upon the land, but Riddell, J., there being no evidence that he had sustained any loss, refused to pronounce a judgment declaring him entitled to this charge, as such judgment would be purely academic, in view of the fact that, if he had no right to a charge upon the realty, he was not entitled to such declaration, whereas, if he had such right, there was no need for a declaration, since any purchaser or mortgagee would take with express notice of his claim.

Chattel Mortgage.]—An appeal by the plaintiff in McCann Milling Co. v. Martin from the judgment of MacMahon, J., 10 O. W. R. 264, noted ante 554, was dismissed by a Divisional Court: 10 O. W. R. 681.

Company.]—In Beaudry v. Read, 10 O. W. R. 622, it was sought to have certain proceedings at an annual meeting of the Ruethel Mining Co. declared unlawful, because, at the time, there was, or was believed to be, an injunction still in force restraining certain shareholders of the company entitled to a majority of the stock from voting in respect of certain shares at any meeting of the company, and it would not be fair, therefore, to allow the proceedings to stand.

* Short notes of the most important cases in Volume X. of the Ontario Weekly Reporter, Nos. 22, 23, 24, 25, pp. 605 to 760, inclusive.

Riddell, J., however, held that, inasmuch as it was open to these shareholders to have applied to the Court for an injunction against the election proceedings or to have the injunction against them suspended so far as to allow them to vote for an adjournment of the meeting, and they had done neither, they could not now complain. It was also decided that the Act having by implication given to the directors of a company the power to pass by-laws for their remuneration, the body of shareholders are deprived of this power; and that the abandonment of a bona fide claim to shares which is disputed is a good consideration for shares voted to a director at a meeting of the company.——The Detroit Yukon Mining Company having failed to carry out their contract to acquire the plaintiffs' mining claim, a new company, called the Canadian Klondyke Mining Company, was formed and incorporated for the purpose of acquiring this claim. Finding as a fact that there was no agreement prior to the incorporation of this latter company for the taking over of certain mining machinery of the Detroit company worth $50,000 and two mining claims worth $15,000, Riddell, J., holds that the issue to certain persons, directors of both companies, of $500,000 of stock in the Canadian company as fully paid up in payment for such machinery and claims, was a breach of trust by these directors, and that the issue and the alleged ratification thereof by the Canadian company, apart from the question of whether those who voted for it were shareholders and entitled to vote, were a fraud upon the company and upon one of the plaintiffs, who had received $250,000 stock therein as part of the purchase price of his claim: Boyle v. Rothschild, 10 O. W. R. 696.——The action of Kelly v. Electrical Construction Co., 10 O. W. R. 704, was brought to have an election of directors of the company set aside and to have it declared that the plaintiffs and one Sifton were duly elected directors. It is decided by Mulock, C.J., that the Court will not intervene in respect of an act such as this, within the powers of the company, and thus capable of confirmation by the shareholders, at the instance of individual shareholders.

as to do so would be fruitless, but leave was given to the plaintiff to make the company a party plaintiff if they could secure the consent of the latter. As to the merits it appeared that the plaintiffs were represented at the meeting by Sifton as proxy, but the chairman refused their votes because the proxies had not been, as alleged, deposited with the company the day before, pursuant to an alleged by-law of the company. Such by-law had been passed in 1897, but not adopted by the shareholders until 1905. It is decided that there was no by-law in force, because the by-law of 1897 ceased to exist as such by force of s. 47 of the Ontario Companies Act, when there was a failure to confirm it at the next annual meeting, and the authority to directors to pass by-laws impliedly withholds such power from the general body of shareholders.

Contract.]—It was necessary to the success of the plaintiff in Clark v. C. H. Hubbard Co. Limited, 10 O. W. R. 675, that it should be declared that a novation agreement, under which he was to receive from persons other than those originally liable to him, certain advantages in lieu of such liability, was invalid, because the issue of certain shares to him as in the novation agreement provided, would be beyond the powers of the companies concerned and unlawful. It was made to appear that for three years and upwards the plaintiff had acted upon the agreement in question, and received considerable benefits under it, including payment of two drafts amounting to $1,150, and 3 years' salary, and during that period withheld all claim against the defendant company. In the circumstances, a Divisional Court affirmed a judgment dismissing the action.——The Court of Appeal in Battle v. Willox, 10 O. W. R. 732 (Moss, C.J.O., and Riddell, J., dissenting), allowed an appeal from the order of a Divisional Court, 9 O. W. R. 48, reversing the order of Anglin, J., 8 O. W. R. 4, allowing an appeal by the defendant from the report of the Master at Welland in an action for damages for breach of contract, holding that this

contract, under which the plaintiff was to participate in certain contracts which the defendant expected to make for supplying gravel from a gravel pit owned by him, in consideration of which the plaintiff indorsed the defendant's note for $5,000, did not absolutely oblige the defendant to procure such contracts, but only to use his best endeavours to do so, because, among other reasons, the plaintiff had the option, instead of participating, to become a partner with the defendant in the gravel pit, in which event he would, in case of the defendant failing to secure any of such contracts, benefit twice, and because of the introduction at the end of the contract, with respect to what the defendant was to do, of the words "to the best of his ability," which, if applied to the earlier section providing for the securing of such contracts, and there was no reason why they should not, would expressly negative such obligation.

Costs.]—An appeal by the plaintiff in Plenderleith v. Parsons from the order of Riddell, J., 10 O. W. R. 387, noted ante 598, was dismissed by a Divisional Court: 10 O. W. R. 658.——The costs, as between solicitor and client, of the unsuccessful action of Madill v. McConnell, 10 O. W. R. 672, which was for a declaration that a certain instrument in writing was not the last will and testament of Joseph Madill, deceased, were ordered to be paid by, not only the plaintiffs, but certain defendants who had made common cause with them in an attack upon the defendant McConnell.

Criminal Law.]—It was decided by the Court of Appeal in Rex v. Capelli, 10 O. W. R. 637, that no absolute obligation rests upon the Crown in a criminal trial to call all the witnesses whose names appear upon the back of the indictment, or to have them present that they may be cross-examined on behalf of the defence, and failure to do so will not affect the validity of the proceedings or serve as a ground upon which a stated case may be directed. The Court, under the appellate jurisdiction and procedure provided by the Criminal Code, R. S. C. 1906 c. 146, cannot entertain a

motion to grant a new trial on the ground that the verdict is against the weight of evidence, unless the trial Court has given the accused leave to move for that purpose: s. 1021. ——The act of negligence for which the defendants in Rex v. Michigan Central R. R. Co., 10 O. W. R. 660, were indicted, and to which indictment they pleaded "guilty," was the shipping from Black Rock to Essex, as described by Riddell, J., "an ordinary car, leaky, loaded partly with dynamite and partly with other freight, shunted into the yard at St. Thomas, left there all night, taken the next day to Essex, shunted there in the afternoon, and, after staying there a day and a half, shunted backwards and forwards with detonations like pistol shots—and no one taking the slightest care." Following this denunciation a fine of $25,000 was imposed.

Defamation.]—The plaintiff sued for slander based upon statements by the defendant that he had broken the seal of a car and stolen a bundle of handles therefrom. The judgment of nonsuit entered by Anglin, J., was set aside by a Divisional Court and a new trial ordered, for, though the occasion when the alleged slander was uttered was one of qualified privilege, it was in evidence that the defendant had told the plaintiff that he did not know or recognize the person who broke into the car, and if the jury should believe this, it would be such evidence of ill intent or malice as would displace the protection afforded by the occasion: Wood v. Plummer, 10 O. W. R. 759.

Dower.]—The plaintiff in Fretts v. Fretts, 10 O. W. R. 613, joined with her husband, since deceased, at his solicitation or command, in a deed made without consideration from the husband to the defendant, their son, for the purpose of barring her dower. The plaintiff acted without independent advice, but understood the effect of what she did. The husband, by his will, made certain provisions for the plaintiff, but this she did not accept in lieu of dower, and brought action for dower in the land mentioned. Riddell, J., being unable to find that the defendant had anything to do with

procuring the deed, or that the deed was obtained by fraud, or such pressure as the law requires before it can be called coercion, or that the plaintiff did not understand the effect of the deed, or that it was improvident, held that the plaintiff's action must fail.

Evidence.]—Having served a notice of motion to a Divisional Court in Trethewey v. Trethewey, 10 O. W. R. 684, to set aside the judgment at the trial, among others, on the ground of the discovery of new evidence, the defendant, intending to adduce in support of the motion the evidence of certain witnesses, procured an appointment from a special examiner for the examination of these witnesses upon the pending motion. The plaintiff then moved to set aside this appointment as irregular and unauthorized by the practice. Anglin, J., held that Rule 491 does not apply to appeals and motions in the nature of appeals, and that fresh evidence could not be adduced upon the pending motion or appeal to the Divisional Court except by leave of the Court under Rule 498.

Fraudulent Conveyance.]—An appeal by the plaintiff in Fallis v. Wilson from the judgment of Mabee, J., 10 O. W. R. 121, noted ante 511, was dismissed by a Divisional Court: 10 O. W. R. 605.

Habeas Corpus.]—The defendant had not been charged with any criminal offence, but only with taking a horse, and he was put in prison because he had "committed a breach of law." When discharging him from custody on habeas corpus Falconbridge, C.J., ordered that no action should be brought against the magistrate or other person in respect of the conviction or anything done thereunder. Upon appeal by the defendant a Divisional Court declared this term of the order of discharge nugatory, being one that the Court cannot impose where a discharge is ex debito justitiæ: Rex v. Lowery, 10 O.W.R. 755.

Interest.]—Upon an appeal by the plaintiff in Plenderleith v. Parsons from the decision of the Master in Ordinary, 9 O. W. R. 265, noted ante 190, Boyd, C., held that in the provision that the former Act, R. S. C. 1886 c. 129, is not to apply to liabilities existing at the time of its passing, the word liabilities means liabilities respecting the rate of interest, and it was directed that interest should be computed at 5 per cent. only after July, 1900: 10 O. W. R. 680.

Landlord and Tenant.]—An appeal by the Ontario Bank in Peterborough Hydraulic Co. v. McAllister from the judgment of Boyd, C., 10 O. W. R. 109, noted ante 512, was allowed by a Divisional Court, on the ground that, there being an express stipulation for indemnity by the bank against other future indebtedness, none should be implied as regards future rents: 10 O. W. R. 694.

Limitation of Actions.]—An appeal by the defendants in Iredale v. Loudon from the judgment of Mabee, J., 8 O. W. R. 963, noted ante 112, was allowed by the Court of Appeal, because the plaintiff's right, if any, could not be a right "in the air," and consequently must depend on one of two things: (1) an easement for support; or (2) possession of the lower floor. The latter the plaintiff did not have, and the former it would take 20 years' enjoyment to establish: 10 O. W. R. 725.

Master and Servant.]—Warren v. Macdonnell, 10 O. W. R. 614, was an action for damages in respect of injuries resulting in the death of an employee of the defendant, by the negligence of the latter, as alleged. The deceased was employed to repair cars upon a switch of the Temiskaming and Northern Ontario Railway, and was working upon a car near the junction of the switch with the main line, when, by reason of the switch being left open, an engine proceeding at about two miles per hour and not intended to go upon the switch, ran a few feet upon it and jarred the car under which the deceased was at the time, causing injuries resulting in his

death. Riddell, J., approved of the finding of the jury that the accident was the result of negligence of the persons in the defendant's employ who were in charge of the yard and repair works not seeing that the switch was kept locked, and directed judgment for the plaintiff, though the jury were unable, from the evidence, to say who such person or persons were, since there must have been some one in charge of the yard—not the deceased—and such person would be, under the Workmen's Compensation for Injuries Act, s. 2 (5), a "person in the service of the employer who has the charge or control of ——— points . . . .upon a railway."

Mechanics' Liens.]—An important point was decided by the Master in Chambers in Canada Sand Lime Brick Co. v. Ottaway, 10 O. W. R. 686. The "'statement of claim" which is the commencement of a statutory proceeding to enforce a mechanic's lien is not like the statement of claim in on ordinary action begun by writ of summons, and therefore vacation is not to be excluded in the computation of the time within which it must be filed to preserve the lien—the consequence being direful in this case to the plaintiffs, who lost their lien by a decision that the proceeding was begun too late.

Mines and Minerals.]—The appellants' claim appearing to be unfounded, their appeals, under ss. 52 and 75 of the Ontario Mining Act, from decisions of the Mining Commissioner finding against their claim, and finding in favour of the claim of the respondent, were dismissed by a Divisional Court, without considering the merits of the respondent's claim, since there could then be no "parties adversely interested" under s. 75; Re Cashman and Cobalt and James Mines Limited, 10 O. W. R. 658.

Mining Commissioner.]—A motion for judgment under Rule 603 in Bassett v. Clarke Standard Mining Co., 10 O. W. R. 752, an action to recover the amount found due by an award of the Mining Commissioner, was dismissed by the

Master in Chambers, on the ground that the Mines Act conferred upon the Commissioner full power to enforce his award.

Municipal Corporations.]—An appeal by the city corporation in Re Halliday and City of Ottawa from the order of Britton, J., 10 O. W. R. 46, noted ante 514, was dismissed by a Divisional Court: 10 O. W. R. 612.

Promissory Note.]—The defendant's husband became indebted to the plaintiff and gave him a promissory note for $163. After maturity the defendant signed this note. There was no desire or request or consent on the part of the defendant that the other parties to the note should be released, and neither party imagined that that would be the result. There was no agreement for an extension of time or forbearance. Apart from the question whether the signature by the defendant was an alteration within s. 145 of c. 119, R. S. C. 1906, such as would invalidate the note, a Divisional Court held that there was no consideration to support the defendant's promise to pay the amount of the note in question: Stack v. Dowd, 10 O. W. R. 633.

Public Schools.]—The situation developed in school section No. 11 Tay was that, after an arbitration and award fixing upon a new site for the school, the ratepayers, at a meeting called for the purpose, refused to sanction the issue of debentures to raise money to pay for the new school building. The trustees declined to raise the whole sum in one year, whereupon a mandamus was sought to compel them to purchase or acquire the property and erect a school building. A Divisional Court held that the trustees could not be compelled to do so, the word "may" in s. 74 of the Public Schools Act, 1901, not having a compulsory force: Re McLeod and Tay (No. 11) School Trustees, 10 O. W. R. 649.

Railway.]—The plaintiffs in Beck v. Canadian Pacific R. W. Co., 10 O. W. R. 644, were licensed by the Victoria

Harbour Lumber Company, who were the assignees of one Picard of a lease from the defendants to him of a parcel of land adjoining the defendants' railway, to use a stable upon that parcel. Picard had covenanted with the defendants to maintain around the lands demised fences sufficient to prevent horses, cattle, and other animals from getting upon the track. In the taking of a shipment of horses from the defendants' stockyard to the stable in question some of them escaped, and, owing to the absence of fences, got upon the railway and were killed. For their loss the plaintiff sued. Riddell, J., following Yeates v. Grand Trunk R. W. Co., 9 O. W. R. 423, 14 O. L. R. 63, noted ante 383, dismissed the action, holding that the assignee of the lease was in the same position as the tenant of an owner, and that the licensees of such assignees could have no higher rights than the latter.

Sheriff's Sale under Execution.]—An appeal by the plaintiff in Steen v. Steen from the judgment of Riddell, J., 9 O. W. R. 65, noted ante 195, was dismissed by the Court of Appeal: 10 O. W. R. 720.

Vendor and Purchaser.]—The defendant in McCullough v. Hughes, 10 O. W. R. 691, an executor, accepted the plaintiff's offer for the purchase of certain lands, so far as he was concerned, and signed below the offer the following: "I think the above offer should be accepted. Thomas Hughes, administrator." Owing to the fact that a lunatic was interested, it was necessary that the sale should be approved by the official guardian, and it was arranged at the time the plaintiff's offer was made that it should be sent to the official guardian with a letter asking him to telegraph on receipt whether the offer was to be accepted. The plaintiff went into possession at once. After receiving a telegram of acceptance from the official guardian, the defendant telephoned the latter that he had received an offer slightly better than the plaintiff's and sought to withdraw from the sale to the plaintiff. Riddell, J., discrediting the evidence of the defendant that he was intoxicated and did not know what took

place, decreed specific performance of the agreement.——— An appeal by the defendant in Bowerman v. Fraser from the judgment of Britton, J., 10 O. W. R. 229, noted ante 561, was allowed by the Court of Appeal, because the Court was unable upon the evidence to adopt the view that McT. was the defendant's agent, notwithstanding any agreement there may have been to share in any commission payable: 10 O. W. R. 729.

Voters' Lists.]—It is decided by the Court of Appeal in Re Norfolk Voters' Lists, 10 O. W. R. 743, that questions such as stated by the County Court Judge in this case, not having the features of general questions, but being specific cases depending each upon its own particular facts, which may never be precisely the same in any other case, so that an opinion must be given upon each separately, are not of the character of questions mentioned in s. 39 of the Ontario Voters' Lists Act, in respect of which a case may be stated. ——It is also decided by the Court in Re South Fredericksburgh Voters' Lists, 10 O. W. R. 746, that, upon the proper construction to be put upon the Act, with especial reference to ss. 14 (1) and 15 (1) and form 5, a resident of and voter in a municipality in an electoral district who appeals against the voters' list of another municipality in the same electoral district, prepared by the municipal clerk under the Act, but on which last mentioned list the appellant is not entered nor entitled to be entered as a voter, is not entitled to be an appellant against persons entered on the last mentioned list under the Act, the retaining of the form provided by the old Act being a slip which cannot prevail over the intention to change the law expressed in the enactment.

Water and Watercourses.]—It was hoped by the appellants in Re Beck Manufacturing Co., 10 O. W. R. 711, that the Court of Appeal would interpret their former judgment in Beck Manufacturing Co. v. Ontario Lumber Co., 12 O. L. R. 163, 8 O. W. R. 35, as a practical overruling of the decision of a Divisional Court in Re Beck Manufacturing Co.

and Ontario Lumber Co., 3 O. W. R. 333, and would hold that a County Court Judge might entertain an application to fix tolls after the close of the season's operations in respect of which the tolls were to be levied; but the Court was against the contention, Garrow, J.A., dissenting.

Way.]—The gist of the decision of a Divisional Court in McLellan v. Powassan Lumber Co., 10 O. W. R. 630, may be gathered from the following excerpt from the judgment of the Chancellor: "The severance of the land in respect of which an easement existed over one part for the benefit of the other does not per se revive the extinguished easement, if the dominant part is first granted and the servient part retained by the owner who made the severance. Such is the condition of the land in question here, and I do not read the provisions of the Land Titles Act as operating to a different result." The way in question was not a way of absolute necessity.

CASES FROM WESTERN CANADA.*

Assessment and Taxes.]—Stuart, J., in Re Spruce Vale School District No. 209 and Canadian Pacific R. W. Co. (N. W. P.), 6 W. L. R. 526, decides that by reason of s. 24 of the Alberta Act establishing the constitution of the province, it could not be contended that the new province, not a party to the contract, referred to and confirmed by 44 V. c. 1 (D.), was not bound by it, and therefore empowered to tax lands within the 24-mile limit granted to the company under and by virtue of such contract, notwithstanding the exemption provided for in s. 16 of such contract, and that the question of the validity of an assessment of such lands is concluded by Spring Dale School District v. Canadian Pacific R. W. Co., 35 S. C. R. 550. It is suggested, however, in view of an intimation that the decision of the Privy Council might be sought upon the question, that, the Dominion of Canada being a trustee for the people of Canada of these lands, it might be proper to apply in favour of the beneficiaries the principle of equity that that must be held to have been done which ought to have been done, so that the grant of these lands to the company would be treated as having been made upon the completion of the road when the company became entitled to it. ——It is decided by Newlands, J., in Osler v. Coltart (N. W. P.), 6 W. L. R. 536, that taxes assessed upon the plaintiff's homestead prior to entry by him, and while the same was held by previous homesteaders, whose entries were afterwards cancelled, no patent having been issued for the land, were improperly assessed, and, having been paid, should be refunded. It was further held that not only are the lands not liable to taxation, but the taxes could not be treated as

*Short notes of the most important cases in Volume VI. of the Western Law Reporter, Nos. 4 and 5, pp. 445 to 584, inclusive.

taxes to be paid by the plaintiff personally and collectable by methods prescribed by the Act, other than by a sale of the land itself.

Contract.]—The case of Lett v. Lye (B. C.), 6 W. L. R. 484, is one where a provision in a contract, actually at the time the deed was executed a condition precedent, has by matter ex post facto ceased to be such. The plaintiff sued for an amount agreed to be paid him by the defendant for furnishing information as to timber limits. It was a condition that he should secure a cancellation of an agreement with one Grose. After the action was launched, the defendant procured from Grose an assignment of this agreement, and it was decided by the full Court that he had, by thus preventing compliance by the plaintiff with the condition, changed its nature from that of a condition precedent to an ordinary term of the contract, and that the plaintiff was entitled to maintain the action.

Costs.]—Mathers, J., in Emerson v. Wright (Man.), 6 W. L. R. 493, varied his judgment, 5 W. L. R. 365, noted ante 394, by which costs were refused to the plaintiffs although succesful, because they had made serious allegations of misconduct against the defendant, which were unsupported by the evidence, by allowing the plaintiffs one-half the costs of suit up to and including the trial, following Peacock v. Reddington, 5 Ves. 800, which is authority for apportioning the costs in such circumstances.

Interpleader.]—The point decided by Wetmore, J., in Mears v. Arcola Woodworking Co. (N. W. P.), 6 W. L. R. 547, is that, where a debtor has been served with a garnishee summons at the instance of a creditor of his creditor, judgment not having been recovered, and claims are made by others to the moneys owing by the garnishee, the garnishee cannot proceed to interplead under clause 1 of Rule 431, but must proceed under Rule 392.

Landlord and Tenant.]—It is decided by Lampman, Co.C. J., in Warren v. Winterburn (B. C.), 6 W. L. R. 498, that the defendant, who occupied a house in Victoria as tenant of the plaintiff, having, during unusually severe weather, tried to turn off the water and so empty the pipes and radiators of the hot water heating plant, which he was unable to use because of the scarcity of fuel, and finding it impossible to do so without shutting off the supply of water to the house, allowed it to remain, as a result of which several radiators were broken, was not liable in damages, as it was in evidence that many others, some owning their own houses, had failed to take the simple precaution of turning the water off and had had pipes and radiators burst, there being no failure to use the premises in a tenant-like manner, and his user thereof, though he was a stranger in the country, comparing favourably with the manner in which many owners had used theirs.——Huntting v. MacAdam (B. C.), 6 W. L. R. 501, was an action to establish the validity of a lease and for relief against the forfeiture thereof. The defendant set up that her husband, with whom the lease was negotiated, was incompetent to transact business, and that she was coerced into executing the lease by fears as to the effect of her refusal upon her husband, in the precarious state of health in which the latter then was. Irrespective of whether the facts were as alleged, Hunter, C.J., held that, having after a consultation with her legal adviser handed over the lease to the plaintiff without protest, she was estopped from availing herself of the defence set up. The fact that the lease contained an option for purchase by the plaintiff was held to be no objection to its rehabilitation, rather the reverse. Coventry v. McLean, 21 A. R. 176, is cited and distinguished.——The defendants in Nimmons v. Gilbert (N. W. P.), 6 W. L. R. 531, lessees, under an instrument under seal, of a quarry belonging to the plaintiff, which instrument contained a provision that the defendants should not employ more than 10 men in the quarry, sought by parol evidence to establish a new agreement by which such provision was abrogated.

Stuart, J., however, overruled this contention, because the original lease, being for a term of over three years, was a contract required by the Statute of Frauds to be in writing, and such a contract, though it may be wholly rescinded by a valid oral agreement, cannot be partly abandoned or varied thereby. Such oral variations also are no ground in equity for the refusal of specific performance of the original agreement. An injunction restraining the defendants from committing breaches of the provision mentioned was granted, but only, in the circumstances, because such provision was a negative one.

Libel.]—It is decided by Morrison, J., in Chinese Empire Reform Association v. Chinese Newspaper Publishing Co. (B. C.), 6 W. L. R. 489, that an action for libel is maintainable by a corporation created under the Benevolent Societies Act, as well as by a trading corporation, and, where the libel complained of is calculated to affect the value of the property of such corporation, or the business reputation thereof, the action is maintainable without allegation or proof of special damage.——It is decided by Scott, J., in Goode v. Journal Publishing Co. (N. W. P.), 6 W. L. R. 511, that s. 1 of Lord Campbell's Act, 6 & 7 V. c. 96, is not restricted in its operation to cases of libel other than by newspaper; and an allegation in the statement of defence of the offer by the defendants of a suitable apology was held to be properly pleaded, although there was no payment into Court pursuant to s. 2 of that Act, as amended by 8 & 9 V. c. 75.

Limitation of Actions.]—The evidence adduced in support of the claim of the plaintiff in Callaway v. Platt (Man.), 6 W. L. R. 467, to adverse possession of the lands in question, was considered by Richards, J., unsatisfactory. Any evidence there was, outside of that given by the Callaway family, was very meagre, and the evidence, as a whole, would rather tend to support a claim of adverse possession by the plaintiff's husband, the head of the family, who also owned

other lands in the neighbourhood. An amendment looking to the setting up of a quit claim deed from the husband to the wife, was refused, on the ground that no one claiming a title by length of possession is entitled to any indulgence from the Court. Besides, there was the fact that the husband had always disclaimed any right to a title by possession. ——The ruling of Mathers, J., in Campbell v. Imperial Loan Co. (Man.), 6 W. L. R. 481, following Rutherford v. Mitchell, 15 Man. L. R. 390, is that the statute begins to run against a mortgagor, so as to bar any claim to redemption of the mortgaged premises, from the time the mortgagor ceases to be in actual possession thereof, although the mortgagee may not have entered into actual possession. A notice of exercising power of sale served or posted up after the period of limitation has expired is held not to be such an acknowledgment in writing as will take the case out of the operation of the statute.

Malicious Prosecution.]—The full Court in Chute v. Stewart (Y. T.), 6 W. L. R. 569, held, Macaulay, J., dissenting, that, the affidavit which was the basis of the prosecution of the plaintiff for perjury, being, notwithstanding his acquittal, clearly false, there was no want of reasonable and probable cause on the part of the defendant in having him arrested. It was held, also, that this being a matter for the decision of the trial Judge and not of the jury, the full Court had power to review his finding upon it. It was decided also that the charge of the trial Judge was defective in that it was not pointed out to the jury that they must find actual malice on the part of the defendant, and that such actual malice not being established, the plaintiff's action for malicious prosecution must fail.

Mechanics' Liens.]—Johnstone, J., in Kilbourne v. McEwan (N. W. P.), 6 W. L. R. 562, following the Ontario cases, applies the rule that the existence of trifling defects, subsequently cured, does not extend the time for filing a lien, until

30 days from the date upon which the defects were made good, even though the work be accepted upon the understanding that the defects are to be remedied.

Mortgage.]—The plaintiff in Winthrob v. Roberts (Man.), 6 W. L. R. 476, had applied to the Canadian Northern Railway Company to purchase a quarter section of land, of which he was in possession. The company refused to enter into a binding agreement to sell until a payment had been made, but, in the meantime, recognized the plaintiff as purchaser. The defendant, having lent the plaintiff money which the latter was unable to repay, required him to furnish security, and procured from the plaintiff a quit claim deed. Subsequently he paid the company off and secured the patent in his own name. Mathers, J., decides that, notwithstanding that the plaintiff had no binding agreement with the company at the time the defendant presented his quit claim deed, and had himself substituted for the plaintiff as purchaser, the defendant was not free to purchase on his own account, and that all he did was done in the character of mortgagee, and that that relationship had always existed between the parties.

Municipal Corporations.]—A by-law making the selling of goods an essential element of the offence for which a conviction may be made, passed under the provisions of c. 55 of the Acts of Alberta, 1906, which conferred power upon city councils to pass by-laws "for fixing, altering, and regulating from time to time the hours of opening and closing retail stores and places of business within the city," etc., such by-law containing a provision, in addition to the provision for early closing, that no conviction should be made under it unless it were proved that the accused had offered to sell goods, is held by the full Court, in Rex v. Doll (N. W. P.), 6 W. L. R. 512, Harvey. and Scott, JJ., dissenting, to be unauthorized by the Act in question.

Parties.]—In Waterous Engine Works v. Howland (N. W. P.), 6 W. L. R. 541, it appeared from the allegations con-

tained in the plaintiffs' statement of claim that the defendant Howland had bought certain machinery from the plaintiffs, giving his promissory notes in payment, and, later on, had bought other machinery from the plaintiffs, giving in payment the promissory notes of the defendants the Saskatchewan Mutual Development Company, to which he was not a party. In respect of all these notes the plaintiffs sued Howland and the Saskatchewan Mutual Development Company. Wetmore, J., decides that the causes of action against the two defendants are entirely separate and distinct, and that such causes of action were improperly joined. It is also decided that such joinder is not a mere irregularity, and therefore that the objection is not waived by reason of one of the defendants having asked for and obtained an extension of time for putting in his defence.——In Hilditch v. Yott (Y. T.), 6 W. L. R. 565, the plaintiff claimed against the defendant Perkins for breach of an alleged guarantee or representation made on the sale by him of a mining claim that the soil had not been worked, and against the other defendants for trespass to this claim. Perkins sought to have his name struck out as a defendant, but Craig, J., refused the application, considering the one claim so much involved in the other, and the right to recover against one party or the other so much dependent on the way in which the evidence should come out, that all the issues should be tried in one action, and directed that, on the plaintiff securing him against costs, Perkins should be made a party plaintiff, otherwise he should remain a party defendant.

Pleading.]—A plea alleging contributory negligence on the part of the plaintiff was allowed by Wetmore, J., to be pleaded with a plea of not guilty by statute in Daniel v. Canadian Pacific R. W. Co. (N. W. P.), 6 W. L. R. 538, an action for damages for alleged injury to the plaintiff's horses by one of the defendants' trains, because the particular negligence complained of being specified, it apprises the plaintiff of what the defendants intended to set up. Also, without

deciding whether it were an answer to the action or available under the plea of not guilty by statute, an allegation that the horses were permitted to be at large upon a highway within half a mile of the intersection of such highway with the railway at rail level, and that they were not in charge of any person or persons to prevent them loitering or stopping on the highway at the intersection, or straying upon the railway, was allowed.

Sale of Goods.]—It was found by Johnstone, J., in Bannerman v. Barlow (N. W. P.), 6 W. L. R. 557, that the plaintiff, upon the occasion of the sale of a threshing outfit to the defendant, which the latter had never seen, had represented to him that the outfit was then in good, complete running and working order, as good as new, and had only been used 120 days, and was fit for the purpose of threshing grain, for which purpose, to the plaintiff's knowledge, it was bought. All of these representations were untrue, and the defendant refusing to accept the outfit, the plaintiff sued for the price thereof. It was decided that the sale was a sale by description within s. 13 of the Sale of Goods Act, and that the plaintiff could not recover.

Vendor and Purchaser.]—The defendant in Manahan v. Hamelin (Man.), 6 W. L. R. 460, had given to the plaintiff notice of cancellation of an agreement for the sale of land, alleging default by the latter in carrying out the terms of the agreement. This latter contained no provision looking to cancellation by either party on default of the other. It is decided by Richards, J.A., that the defendant could not cancel the agreement as he had attempted to do, at least without previously giving notice of his ability and willingness to carry out the agreement on his part, and requiring the plaintiff to complete within a reasonable time.——The point decided by Stuart, J., in Stringer v. Oliver (N. W. P.), 6 W. L. R. 519, is that where a contract for the sale of land provides for payment of the purchase money in instalments,

and that time shall be of the essence of the contract, the burden of proving that time is not essential is upon the party seeking to escape from the express provisions of the contract, and that the waiver with respect to the provisions as to time in the case of one instalment does not constitute a waiver as to later instalments without something more. The rule as to the forfeiture of moneys paid does not extend to instalments subsequent to the first or deposit payment.

DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.*

Chinese Immigration Act.]—By s. 27 of R. S. C. 1906 c. 95 it is provided that "every person of Chinese origin who wilfully evades or attempts to evade any of the provisions of this Act as respects the payment of the tax, by personating any other individual, or who wilfully makes use of any forged or fraudulent certificate to evade the provisions of this Act, and every person who wilfully aids or abets any such person of Chinese origin in any evasion of any of the provisions of this Act, is guilty of an indictable offence," etc. In Rex v. Seventeen Chinamen (N. S.), 3 E. L. R. 551, the defendants were detained under a warrant charging that they did "unlawfully and wilfully attempt to evade the provisions of the Chinese Immigration Act as respects the payment of the tax." Upon the return of a habeas corpus the discharge of the defendants was moved for, and Russell, J., said: "The only evasion or attempt at evasion of the Act which is made punishable by the first branch of s. 27 is an evasion by personation, or by the use of a forged or fraudulent certificate, and neither of these things is charged in the warrant. But I am asked to enlarge the meaning of these words, because, in the provision as to aiding and abetting an evasion or attempt at evasion, there is no limitation defining the nature or method of the evasion. In the case of a white man . . . it would be contended that the clause as to aiding and abetting should be read restrictively, by the insertion of the adverb 'so' or the adjective 'such,' or some equivalent expression, to make it as narrow as the clause defining the crime of the principal offender. I know of no rule of construction under which a criminal statute must be read

* Short notes of the cases in Volume III. of the Eastern Law Reporter, No. 11, pp. 537 to 584, inclusive. This number contains no cases from Quebec.

one way for a white man and a different way for a brown man, and I think the present would be a very inopportune time for the creation of such a precedent." The learned Judge therefore held that the imprisonment was illegal, and refused to order the detention of the prisoners pursuant to the special provision of the Criminal Code, under the heading of "Extraordinary Remedies," whereby a prisoner may be detained without any warrant at all where the return shews that he may be guilty of the indictable offence alleged against him.

Constitutional Law.]—The question of the validity of the confiscation provisions of the Prince Edward Prohibition Act, 1900, was raised upon demurrer in Matthews v. Jenkins (P. E. I.), 3 E. L. R. 577, among other questions chiefly of pleading. Hodgson, J., delivering the judgment of the full Court, said: "The point raised by the plaintiff that so much of the Prohibition Act as authorizes the confiscation of the liquor is ultra vires of the legislature, we do not concur in. There would be a good deal in the argument worthy of serious consideration, if an Act were passed for an offence over which the provincial legislature had jurisdiction and for committing which the punishment was declared to be the confiscation of all his property. When such a question is brought before us, it shall receive our serious consideration, but this is nothing like such a case. Unquestionably, the provincial legislature had jurisdiction over the subject, and upon conviction of the offender it forfeits as a guilty thing the res by which the offence was committed."

Criminal Law.]—The decision of the full Court in Rex v. Barnes (N. S.), 3 E. L. R. 539, is rather meagrely reported, but we may gather that upon an indictment and conviction of the defendant for rape the trial Judge reserved for the Court the question whether the verdict of the jury was properly accepted and should be acted upon, there having been, as alleged, improper communication between members of the jury and the sheriff during their deliberations. Contradict-

ory affidavits were before the Court, two of the jury swearing to a most improper direction given to them by the sheriff in answer to a question put to him when he visited the jury room to ask if they were likely to agree, and the sheriff denying it. The majority of the Court seemed to be of opinion that a case could not be reserved upon such a question, incidentally confirming the well known rule that affidavits of jurors as to what took place in the jury room will not be received.

Fraud and Misrepresentation.]—In Gould v. Gillies (N. S.), 3 E. L. R. 21, it was held by the full Court that the misrepresentation made by an agent of the plaintiff to the defendant upon the faith of which the defendant purchased shares held by the plaintiff in a company, viz., that the shares were treasury shares, was a material one, and that the defendant, though disentitled by delay and acquiescence to repudiate the sale, and therefore liable upon his promissory note for the price of the shares, was entitled to suceed upon his counterclaim for the misrepresentation: the principal is liable when the agent perpetrates a fraud.

Holiday.]—It was decided by the full Court in In re Gillies (P. E. I.), 3 E. L. R. 565, that a conviction for an offence against the Prohibition Act was not invalid because the hearing was continued before the convicting magistrate on a day proclaimed by the Governor-General for Thanksgiving: for, to constitute a holiday under provincial legislation, it must be appointed by the Lieutenant-Governor; and, the day in question not being so appointed, it was not illegal for the magistrate to hold his court thereon.

Judgment Debtors Act.]—Three points were decided by the full Court in McKinnon v. McDougall (P. E. I.), 3 E. L. R. 573, with regard to the Judgment Debtors Act: (1) that no appeal lies from the order of a Judge discharging the defendant from custody, made under the provisions of the Act of 1876, 39 V. c. 9, amending 14 V. c. 2; (2) that the pro-

vision of the later Act empowering a Judge to discharge an insolvent debtor from custody is intra vires of the provincial legislature, the case of Munn v. McCannell, decided by the same Court in 1877, while the Dominion Insolvent Act of 1875 was in force, not being applicable now; and (3) that the Indigent Debtors Act, 1879, did not by implication repeal 14 V. c. 2 and all amending Acts.

Security for Costs.]—In the Supreme Court of Nova Scotia, acording to the ruling of Graham, E.J., in Liebler v. Harkins (N. S.), 3 E. L. R. 538, though the point is said not to be free from doubt on account of previous unreported decisions, a defendant who is out of the jurisdiction cannot, on that ground, be made to give security for costs when he becomes an actor and appeals to the full Court from the judgment at the trial in favour of the plaintiff—he remains a defendant, the appeal being a mere rehearing.

Stipendiary Magistrate.]—It was held by the full Court in In re William Kennedy (P.E.I.), 3 E. L. R. 554, that a stipendiary magistrate had no jurisdiction to convict the defendant upon the return of a summons, in the defendant's absence, because the summons was served by the prosecutor, acting as constable, and the conviction was upon that ground quashed.——Upon an application to quash a conviction by the stipendiary magistrate for the city of Charlottetown, under the Prince Edward Island Prohibition Act, it was contended that he was disqualified by reason of his being a ratepayer of the city, to which parts of the fines for breaches of the Act were payable, and from which he received his salary: In re Gillis (P.E.I.), 3 E. L. R. 565. The Act provides that all persons violating its provisions shall be tried before the stipendiary magistrate for the city, town, or county in which the offence is committed. The full Court held that the magistrate was prima facie disqualified by reason of his slight pecuniary interest as a ratepayer, and was not relieved of the disqualification by 16 Geo. II. c. 18; but that the

necessity of the case saved his jurisdiction, because if he could not try offenders, they could not be prosecuted at all. It was also held that the objection could be and had been waived by the defendant's acquiescence in the magistrate's exercise of jurisdiction, the conviction attacked being the fourth made against the defendant by the same magistrate under the Act, and the defendant not having shewn that he did not know at the time of the trial that the magistrate was interested as a ratepayer.

Voluntary Conveyance.]—Inglis v. Paw (P.E.I.), 3 E. L. R. 556, was a case of the familiar kind where a father conveys his farm absolutely to his son, the son covenanting to support his father and mother. The son was in fact largely supported by his father's labour during the few years that he lived after the transaction, and died leaving a widow and baby, but no will. The land was of course vested in the child, subject to the son's widow's right of dower and the father filed a bill to set aside the conveyance. A decree setting aside the conveyance for improvidence, but without costs, was pronounced by Hodgson, M.R., who referred to Lavin v. Lavin, 27 Gr. 567, and Beeman v. Knapp, 13 Gr. 398—"not because they are Ontario cases, but because Chancellor Spragge's and Vice-Chancellor Mowat's reasoning commends them to my judgment."——The voluntary conveyance attacked in Leard v. Cameron (P.E.I.), 3 E. L. R. 561, being from father to son, was upheld as against the attacking creditors because the grantor was at the time of the conveyance possessed of ample means above and beyond the property conveyed, and the plaintiffs had slept on their rights for 6 years.

EDITORIAL REVIEW.

Sir Charles Moss.

Among the honours bestowed by His Majesty on the celebration of his birthday on the 9th November was a knighthood for the Hon. Charles Moss, Chief Justice of Ontario.

Sir Charles Moss, now Knight Bachelor, has been Chief Justice of Ontario and President of the Supreme Court of Judicature for Ontario since 1902, and a Justice of the Court of Appeal since 1897. The strong head of a strong Court. He was born at Cobourg in 1840, and, after leaving the public schools, joined his father in the brewery business. In 1864 he decided to study law, and after a brilliant career as a student, in each year of which he captured a scholarship, he was called to the Bar in 1869. He first joined the firm of Osler & Moss, of which his brother, the late Chief Justice, was one partner, and Mr. Justice Osler the other. Subsequently he was associated with the late Chief Justice Harrison, the late James Bethune, the present Mr. Chief Justice Falconbridge, Dr. N. W. Hoyles, now Principal of the Ontario Law School, Mr. Aylesworth, the present Minister of Justice, and the late Mr. Walter Barwick. In 1880 he was elected a Bencher of the Law Society, and in the next year was made a Q.C. In 1878 he declined the Liberal nomination for the legislature in East Toronto, and in his only venture into the political field in 1894 was defeated in South Toronto by the late Mr. O. A. Howland. He became a Senator of the University of Toronto in 1884, and from 1900 to 1906 was Vice-Chancellor. At present he is a member of the University Board of Governors.

Knighthoods and the Bench.

It seems that in Canada knighthoods are frequently bestowed on Chief Justices of the Dominion and higher provincial Courts, but seldom, if ever, upon puisne Judges.

Perhaps it is a pity that there is not uniformity. The conferring of the dignity of knight bachelor by the Imperial power is, no doubt, at the instance of the advisers of the Governor-General, and the appearance of caprice might well be removed. By the peculiar constitution of our Ontario Courts there are five Chief Justices. Four of them are now knighted—the last to become so being the highest in official rank, the Chief Justice of Ontario. The fifth ought to be allowed a handle to his name, if only for the sake of symmetry. Precedence has nothing to do with it. The Chief Justices and all the Superior Court Judges as such, rank before knight bachelors, and, indeed, the reason of bestowing knighthoods upon Judges (as is almost invariably done in England, though not in Ireland) is that their wives may have some social status, they "taking nothing" from their husbands' judicial positions. This is exemplified by the well known fact that Judges who have, from the accident of birth or otherwise, a precedence of their own, do not accept knighthood from the Crown. Thus Lord Coleridge, whose status as a peer of the realm is superior to that of a knight bachelor, did not receive knighthood on his recent promotion to the High Court Bench in England. The late Mr. Justice Denman, as the younger son of a peer, was, for a similar reason, not knighted on becoming a Judge. And, to shew more pointedly why the dignity is usually accepted, Mr. Justice Wright, who on his appointment to a judgeship was unmarried, and whose official position gave him precedence of a knight bachelor, did not accept the honour of knighthood, which, however, was conferred on him some years afterwards, on his marriage, to enable his wife to take precedence in Court ceremonials to which the wives of the highest official personages who derive rank, not from status, but from their official positions, are not entitled. Mr. Spencer Perceval, who was, when Prime Minister, assassinated in the lobby of the House of Commons in 1812, and had previously filled the office first of Solicitor-General and subsequently of Attorney-General, as the son of a peer was not knighted. At a

more recent period the late Right Hon. James Stuart Wortley, who on his appointment to the position of Judge Advocate-General in 1846 was sworn of the Privy Council, vacated the Recordership of London in 1856, which he had filled for six years, on his appointment to the Solicitor-Generalship. He did not, however, as a Privy Councillor and the son of a peer accept knighthood. When, however, Sir Edward Carson, who in 1896 had been sworn of the Irish Privy Council, was in 1900 appointed Solicitor-General for England, he accepted the honour of knighthood for the purpose of conferring a status on his wife entitling her to precedence. Mr. Stuart Wortley and Sir Edward Carson are, so far as we are aware, the only instances in which members of the Privy Council have filled the post of Solicitor-General, as Sir Robert Finlay is the only instance in which an Attorney-General was made, while holding that position, a Privy Councillor. The Privy Councillorship conferred on Sir Henry (Lord) James in 1885 was on the occasion of his resignation of the Attorney-Generalship.

Benchers of the Law Society of Alberta.

The election of benchers for the Alberta Law Society took place on the 4th November. The polls closed at 11 o'clock, and when the final count was made it was learned that the following were elected in the order named: James Muir, K.C., Calgary; C. F. P. Conybeare, K.C., Lethbridge, W. L. Welsh, K.C., Calgary; J. C. F. Bown, K.C., Edmonton; D. G. White, Medicine Hat; James A. Lougheed, K.C., Calgary; H. C. Taylor, Edmonton; Geo. W. Greene, Red Deer; O. M. Biggar, Edmonton.

Ex-officio officers are:—The Hon. A. B. Aylesworth, K.C., the Hon. C. W. Cross, F. W. G. Haultain, K.C.

Charles F. Adams is secretary of the society.

District Court Judges in the North-West Provinces.

An order in Council was passed at Ottawa on the 21st November appointing the following District Court Judges

for Alberta and Saskatchewan, as provided in the Act passed at the last session of Parliament: Charles R. Mitchell, Medicine Hat, for the district of Calgary; H. C. Taylor, Edmonton, for the district of Edmonton; J. Camilen Noel, Edmonton, for the district of Wetaskiwin; A. A. Carpenter, Innisfail, for the district of MacLeod; Roland Winter, Calgary, for the district of Lethbridge; F. F. Forbes, Regina, for the district of Prince Albert, Sask.; A. G. Farrell, Moose Jaw, for the district of Moosomin; A. C. McLorg, Moosomin, for the district of Saskatoon; T. C. Gordon, Carnduff, for the district of Yorkton; Reginald Rimmer, Regina, for the district of Cannington.

A Belleville Bar Dinner.

"Belleville, deep of soil, nurse of heroes," as a now long-deceased wit and poet of the Toronto Bar was wont to say, is gaining an enviable reputation for pleasant Bar dinners during assize weeks. It is not long since we chronicled an entertainment given in honour of Mr. Justice Clute, and now we extract the following from the Belleville *Ontario* of the 26th November:—

Mr. Justice Riddell (of the Ontario High Court) and Mr. Justice Macaulay (of the Yukon Territorial Court) were the guests of honour at a banquet at the "Crystal" last night given by the Bar of Belleville and the County of Hastings Law Association as a tribute of esteem and regard. Mr. Justice Riddell spent part of his student days in Belleville in the office of Dougall & Falkiner, and to Mr. Justice Macaulay this city is still "home." Very impressive addresses were given by both guests upholding the dignity and honour of both Bench and Bar, while reminiscent anecdotes and brilliant epigrams filled a most pleasant and profitable evening. Splendidly rendered songs by Mr. F. E. O'Flynn, Mr. Peter Forin, and Mr. William Casement, were much appreciated by the goodly company of thirty who sat down at the epicurean tables under the presidency of Col. W. N. Ponton; the vice-chair being occupied by Mr. J. J. B. Flint.

The Dominion of Canada was responded to by Sir Mackenzie Bowell (the only "layman legislator" present), and E. G. Porter, M.P.

From the veteran of the Bar, Mr. J. Parker Thomas, to the two youngest and only law students (Messrs. Cochrane and Collins), all contributed to the enjoyment of the evening.

Col. S. S. Lazier, Mr. John Williams, and Judge Deroche ably "supported" the judicial visitors. Other guests from outside were Mr. William Proudfoot, K.C., of Toronto, Mr. J. L. Whiting, K.C., of Kingston, and Mr. Ware, of Tweed. An interesting feature was the reading of the old roll-call by Mr. W. C. Mikel, shewing all past and present members of the Bar which has given two Chief Justices and a Judge to Manitoba, two Judges to the Yukon and British Columbia, and half a score of Judges to the Bench of Ontario. Belleville may be proud of the status of those energetic citizens who constitute in our midst the "legal profession"—who are true to the old traditions.

The Bench in Nova Scotia.

Mr. Justice Townshend has been made Chief Justice of the Supreme Court of Nova Scotia, and Mr. F. A. Laurence, M.P., a Judge of the Supreme Court.

Lord Chancellors and Marriage.

The approaching marriage of Lord Loreburn will be one of the few instances in which a Lord Chancellor when in office has married. The late Lord Coleridge, when Lord Chief Justice of England, entered, in 1885, the bonds of matrimony for the second time. Lord Erskine and Lord Lyndhurst re-married as ex-Lord Chancellors, and Lords Truro, Herschell, and Halsbury had been twice married before they became Lord Chancellors. In Ireland there are several instances of the marriages of Lord Chancellors. Lord Redesdale, who became Lord Chancellor of Ireland in 1802, married in 1803. Lord Manners, who became Lord Chancellor of Ireland in 1807 and held the office without

interruption till 1827, married for the second time in 1815. Sir Maziere Brady, who was three times Lord Chancellor of Ireland, from 1846 till 1852, from 1853 to 1858, and from 1859 till 1866, married for the second time in 1866, in his third Chancellorship; and Lord O'Hagan, who became Lord Chancellor of Ireland for the first time in 1868, married for the second time as Lord Chancellor in 1871. There have been few bachelor Lord Chancellors of England since the time of the ecclesiastical holders of the Great Seal, and of these bachelor Lord Chancellors, Lord Thurlow is certainly the most noted. In Ireland there is no instance in modern times of a bachelor Lord Chancellor, with the exception of Sir Anthony Hart, who was Lord Chancellor from 1827 till 1830, although two Lord Chancellors, Mr. Brewster, who was Lord Chancellor from 1867 till 1868, and Mr. Hugh Law, who was Lord Chancellor from 1881 till his death in 1883, were widowers.—London *Law Times.*

Recent American Decisions.

Banks.—A telegram stating that a certain person's cheque is good for a sum named, sent by a bank in response to a telegraphic inquiry as to whether such person's cheque is good for that amount, is held, in First Nat. Bank v. Commercial Sav. Bank (Kan.), 8 L. R. A. (N. S.) 1148, not to import an absolute promise to pay the amount of the cheque, or constitute a contract of acceptance external to the bill.

Bicycle.—One attempting to ride a bicycle upon a sidewalk, even in the absence of an ordinance prohibiting it, is held, in Fiedler v. Tipton (Ala.), 8 L. R. A. (N. S.) 1268, to take the risk of injury which he may thereby cause to pedestrians with whom he comes in contact.

Carriers.—The mere fact that a person in charge of children to be placed on a train does not buy a ticket for herself when securing theirs, and that she states that she is sending them to their mother, is held, in Louisville & N. R. Co. v. Wilson (Ky.), 8 L. R. A. (N. S.) 1020, not to be

notice that she intends to accompany them into the train and return, so as to require the railway company to give her notice before starting the train after she has entered it.

A railway company are held, in Peterson v. South & W. R. Co. (N. C.), 8 L. R. A. (N. S.) 1240, to owe no duty not to start their cars with a jerk, to one who, in accordance with a practice carried on without their objection, has entered a car to purchase fruit of one not in the employ of the railway company.

Estoppel.—Paying employees of a sub-contractor with their own cheques is held, in Good v. Johnson (Colo.), 8 L. R. A. (N. S.) 897, not to estop contractors from denying their relation of master to such employees, where the cheques on their face shew that they are on account of the pay roll of the sub-contractor.

Forgery.—An offer, by one in possession of a forged cheque, to pass it to another person as a genuine instrument, is held, in Walker v. State (Ga.), 8 L. R. A. (N. S.) 1175, to constitute an uttering and publishing of the cheque, although the offer was not accepted, and he did not exhibit the forged instrument.

Master and Servant.—Retention of an employee in service for a year after learning that he delivered a book of trade secrets to a business rival, is held, in Butterick Pub. Co. v. Whitcomb (Ill.), 8 L. R. A. (N. S.) 1004, to waive the offence so that it cannot be made a ground for his discharge.

That a master is under no obligation to instruct a nineteen-year-old employee of ordinary capacity and intelligence, of the danger attendant upon the mixing of lime and water for the making of whitewash, is declared in Bollington v. Louisville & N. R. Co. (Ky.), 8 L. R. A. (N. S.) 1045.

Public Policy.—Communistic life by the members of a religious corporation is held, in State v. Amana Society (Iowa), 8 L. R. A. (N. S.) 909, not to be contrary to public policy.

Release.—A release from all claims from the beginning of the world, and especially those arising out of a particular accident happening on a specified date, is held, in Chicago Union Traction Co. v. O'Connell (Ill.), 8 L. R. A. (N. S.) 1034, not to be limited to the latter claims, but to include those arising out of an accident happening on a prior date.

Street Railways.—Proof that the motorman of the car which injured the plaintiff failed to observe a requirement of the street railway company that its car "run slow" at the crossing where the injury occurred, is held, in Hayward v. North Jersey Street R. Co. (N. J. Err. & App.), 8 L. R. A. (N. S.) 1062, to be evidence, although not conclusive, from which the jury would be warranted in finding the motorman negligent.

Operating a street car at a speed in excess of that prescribed by ordinance is held, in Ford v. Paducah City Railway Co. (Ky.), 8 L. R. A. (N. S.) 1093, to be of itself no evidence of the negligence, in an action for injuries caused by collision between a car and a pedestrian.

BOOK NOTICES.

Salmond's Law of Torts.—A Treatise on the English Law of Liability for Civil Injuries, by John W. Salmond, M.A., LL.B., Fellow of University College, London, a Barrister of the Supreme Court of New Zealand. London: Stevens and Haynes: 1907 (18 s. net).

The author, in a modest preface, says that he has endeavoured to set forth the principles of the law of torts with as much precision, coherence, and system, as the subject admits of, and with as much detailed consideration as is necessary to make the work one of practical utility. He hopes that it "will be found of use to lawyers and to students of law, as a general exposition, in moderate compass, of an extensive and in some respects difficult and imperfectly developed department of our legal system."

Without pretending to have read the book "right slap through," to quote Mr. Silas Wegg, we may say that we should like to have time to do so, for the arrangement is such as to make it a readable treatise as well as a work of reference. Such rough tests as we have been able to apply indicate that the most modern expositions of the law have been carefully studied and adopted. The index is excellent.

Foa's Landlord and Tenant.—The relationship of Landlord and Tenant, by Edgar Foa, of the Inner Temple, Barrister at Law. Fourth Edition. London: Stevens and Haynes: 1907 (30s. net).

Foa on Landlord and Tenant is so well known and of such high authority that it is only necessary to say that this new edition was needed, and that it is an improvement even upon its predecessors. New cases and statutes had to be dealt with, and new points of view presented themselves; the size of the work has, therefore, increased.

PERIODICALS AND PAMPHLETS.

Uniformity of Legislation.—Paper read before the Mississippi Bar Association at its Annual Convention, Vicksburg, Miss., 9th May, 1907, by W. O. Hart, of the New Orleans Bar.

Law Magazine and Review (London, Eng., November, 1907):—"The Law of Moses," by Lex; "Railway Passengers' Personal Luggage," by G. Addison Smith; "The Liability of Justices of the Peace," by W. W. Lucas; "Letting and Subsequent Sale, Estate Agents' Commissions," by J. K. F. Cleave; "The Criminal Procedure and Summary Jurisdiction (Scotland) Bill," by Henry H. Brown; "The Public Trustee Act, 1906," by J. Andrew Strahan; "The International Law Association at Portland," by T. Baty; "Contemporary Foreign Literature," by James Williams.

Dominion of Canada Labour Gazette (October, 1907):—"Report of the Royal Commission Appointed to Inquire into the Dispute between the Bell Telephone Co. and Employees at Toronto;" "The Industrial Disputes Investigation Act, 1907—Proceedings under the Act during September, 1907;" "Legislation in Canada with regard to Mechanics' and Wage Earners' Liens;" "The Trades and Labour Congress of Canada;" etc.

Natal Law Quarterly (30th September, 1907):—"Malice in English and Roman-Dutch as Affecting Defamation;" "Inter Alia."

Case and Comment (Rochester, N. Y., October, November, 1907):—"Capacity for Naturalization;" "Fines as License Fees;" "A Law that Makes a Trap;" "Decisions on the

Federal Fellow Servant Law;" "Baggage and Passenger on Different Trains;" "Liability for Servant's Use of Horse or Automobile for his Own Business or Pleasure;" "The Curse of Tramps;" "Enlightening our Immigrants;" "Exclusive Agencies under Anti-Trust Laws."

Green Bag (Boston, November, 1907):—"Joseph Henry Lumpkin," by the late Chief Justice Logan E. Bleckley; "A Constitutional Question Suggested by the Trial of William D. Haywood," by Charles P. McCarthy; "Circuit Riding in the Philippines," by James H. Blount; "An International Prize Court," by Amos S. Hershey; "Cotton Mather in the Probate Court," by Eugene Tappan; "The Judge as a Political Factor," by Alexander Andrew Bruce.,

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Albany Law Journal (October, 1907):—"Legal Ethics," by John C. Harris; "Morals, Health, and Rights of Women Workers Protected by Labour Legislation," by George A. Russ; "The Trial of the Insane for Crime," by James Hendrie Lloyd; "Liability of Innkeeper for Offensive Acts of Employees;" "Degeneration and Anarchism," by Arthur MacDonald.

Harvard Law Review (November, 1907):—"Enforcement of a Right of Action Acquired under Foreign Law for Death upon the High Seas," by G. Philip Wardner; "Expropriation by International Arbitration," by Charles Noble Gregory; "Agreed Valuation as Affecting the Liability of Common Carriers for Negligence," by Henry Wolf Bikle.

Yale Law Journal (June, 1907):—"Address of the President of the Association of American Law Schools," by Henry Wade Rogers; "The Knight Commander Case," by Theodore S. Woolsey; "Attorneys and Counsellors," by Henry H. Ingersoll.

Criminal Law Journal of India (Lahore, 15th, 30th September, 1907.)

Criminal Law Notes (Parvatipur, vol. 5, part 9.)

The Citator (Madras, June, 1907.)

Madras Law Times (23rd August, 1907.)

Madras Law Journal (July, August, 1907.)

Kathiawar Law Reports (Limbdi, October, 1907.)

Calcutta Weekly Notes (16th, 23rd,30thSeptember, 1907.)

General Digest American and English (Rochester, N. Y., Monthly Advance Sheets, August, 1907.)

Federal Reporter (St. Paul, Minn., 17th, 24th, 31st October, 7th, 14th November, 1907.)

Central Law Journal (St. Louis, Mo., 27th September, 4th, 11th, 18th October, 1st, 8th November, 1907.)

Law Notes (Northport, N. Y., November, 1907.)

Chicago Legal News (19th, 26th October, 2nd, 9th, 16th November, 1907.)

OCCASIONAL NOTES.

Supreme Court of Canada.

QUEBEC.] [17TH OCTOBER, 1907.

PAQUET v. DUFOUR.

Negligence—Dangerous operation — Defective system — Findings of fact—Common fault.

The Supreme Court of Canada affirmed the unanimous judgments of the Courts below, whereby it was held that defendant was liable in damages for injuries sustained by the plaintiff through an accident which occurred in consequence of a defective system of blasting rocks with dynamite, permitted by his foreman of works, where the plaintiff was engaged by him in a dangerous operation.

Montreal Rolling Mills Co. v. Corcoran, 26 S. C. R. 595, and Tooke v. Bergeron, 27 S. C. R. 567, distinguished.

L. P. Pelletier, K.C., and *Bernier*, for the appellant.

Fiset and *Grenier*, for the respondent.

QUEBEC.] [17TH OCTOBER, 1907.

MONTREAL LIGHT, HEAT, AND POWER CO. v. LAURENCE.

Negligence—Electric lighting—Dangerous currents—Trespass—Breach of contract—Surreptitious installations—Liability for damages.

P. obtained electric lighting service for his dwelling only, and signed a contract with the company whereby he agreed to use the supply for that purpose only, to make no new connections without permission, and to provide and

maintain the house-wiring and appliances "in efficient condition, with proper protective devices, the whole according to fire underwriters' requirements." He surreptitiously connected wires with the house-wiring and carried the current into an adjacent building for the purpose of lighting other premises by means of a portable electric lamp. On one occasion, while attempting to use this portable lamp, he sustained an electric shock which caused his death. In an action by his widow to recover damages from the company for negligently allowing dangerous currents of electricity to escape from a defective transformer through which the current was passed into the dwelling:—

Held, reversing the judgment appealed from, that there was no duty owing by the company towards deceased in respect of the installation so made by him without their knowledge, and in breach of his contract, and that, as the accident occurred through contact with the wiring which he had so connected without their permission, the company could not be held liable in damages.

Archer, K.C., and *G. H. Montgomery,* for the appellants.

Henry J. Elliott and *H. R. Bisallion,* for the respondent.

QUEBEC.] [17TH OCTOBER, 1907.

McDOUGALL v. LA BANQUE D'HOCHELAGA.

Company — Liquidation of insolvent corporation — Distribution and collocation—Privileged claim—Expenses for preservation of estate—Fire insurance premiums—Practice—Ex parte inscription—Notice.

M. acquired the factory and plant of an insolvent company, which had been sold under execution by the sheriff, and, pending litigation during the winding-up of the company, operated and maintained the factory as a going concern. The sheriff's sale was set aside, and M. then abandoned

the property to the curator of the estate, and filed a claim as a privileged creditor, for necessary and useful expenses incurred by him in preserving the property for the general benefit of the mass of creditors, including therein charges for moneys paid as premiums on policies of fire insurance effected in his own name during the time he had held possession.

Held, that, in the absence of evidence to shew that such insurance had been so effected otherwise than for his own exclusive interest, he could not be collocated by special privilege on the distribution of the proceeds of the estate for the amounts of the premiums.

When the appeal first came on for hearing upon inscription *ex parte*, on suggestion by one of the creditors not made a party to the appeal, the Court ordered the postponement of the hearing in order that all interested parties might be notified of the appeal.

Judgment of the Court below affirmed.

Brosseau, K.C., for the appellants.

QUEBEC.] [17TH OCTOBER, 1907.

LOGAN v. LEE.

Evidence—Provincial laws in Canada—Judicial notice—Conflict of laws—Negligence—Common employment—Construction of statute —"Longshoreman"—"Workman."

As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the Courts below, or although the opinions of the Judges of the Supreme

Court of Canada may differ from the evidence adduced upon those points in the Courts below.

Cooper v. *Cooper*, 13 App. Cas. 88, followed.

The plaintiff, a longshoreman, was engaged by the defendant in Montreal, to act as foreman on his contracts as a stevedore at the port of St. John, N.B. While in the performance of his work, the plaintiff went into the hold to re-arrange a part of the cargo in a vessel, in the port of St. John, and, in assisting the labourers, stood under an open hatchway, where he was injured by a heavy weight falling upon him, on account of the negligence of the winchman in passing it across the upper deck. The winchman had attempted to remove the article which fell, without any order from his foreman, the plaintiff, and with improperly adjusted tackle. In an action for damages instituted in the Superior Court at Montreal:—

Held, that the plaintiff was entitled to recover either under the law of the province of Quebec or under the provisions of the New Brunswick Act 3 Edw. VII. c. 11, as he came within the class of persons therein mentioned to whom the law of the latter province, relating to the doctrine of common employment, does not apply.

Judgment of the Court below affirmed.

Atwater, K.C., and *Duff*, for the appellant.

Lafleur, K.C., and *H. U. Paget Aylmmer*, for the respondent.

QUEBEC.] [5TH NOVEMBER, 1907.

WINDSOR HOTEL CO. v. ODELL.

Appeal—Finding of jury — Questions of fact — Duty of appellate Court.

In a case where there was conflicting evidence, and the jury, on evidence properly submitted to them, accepted the

evidence on one side and rejected that adduced upon the other, the Supreme Court refused to disturb their findings.

Judgment of the Court below affirmed.

Heneker, K.C., and *Marechal,* K.C., for the appellants.

R. C. Smith, K.C., and *G. H. Montgomery,* for the respondent.

MANITOBA.] [5TH NOVEMBER, 1907.

MANITOBA FREE PRESS CO. v. NAGY.

Defamation—Printing report of ghost haunting premises—Slander of title—Fair comment—Disparaging property—Special damage.—Evidence—Presumption of malice—Right of action.

The reckless publication of a report as to premises being haunted by a ghost raises a presumption of malice sufficient to support an action for damages for depreciation in the value of the property, loss of rent, and expenses incurred in consequence of such publication.

Barrett v. *Associated Newspapers,* 23 Times L. R. 666, distinguished.

Judgment of the Court of Appeal for Manitoba in *Nagy* v. *Manitoba Free Press Co.,* 5 W. L. R. 453, noted ante 453, affirmed.

Ewart, K.C., and *Hudson,* for the appellants.

J. Edward O'Connor, for the respondent.

BRITISH COLUMBIA.] [5TH NOVEMBER, 1907.

NEWSWANDER v. GIEGERICH.

Champerty and maintenance — Malicious motive—Cause of action—Costs of unsuccessful defence—Damages.

A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his

defence as damages for the unlawful maintenance of the suit by a third party, who has not thereby been guilty of maliciously prosecuting unnecessary litigation.

Bradlaugh v. *Newdegate*, 11 Q. B. D. 1, distinguished.

Giegerich v. *Fleutot*, 35 S. C. R. 327, referred to.

Judgment appealed from, 12 B. C. R. 272, affirmed.

E. P. Davis, K.C., for the appellant.

Travers Lewis and *J. F. Smellie*, for the respondent.

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THE
CANADIAN LAW TIMES.

DECEMBER, 1907.

THE LAWYER.

(AN ADDRESS TO THE ONTARIO BAR ASSOCIATION BY THE HON. MR. JUSTICE RIDDELL.)

Mr. Chairman and Gentlemen:—

When I was invited by your officers to address you, I was furnished with a statement of the object and purpose of the association, and I was glad to learn therefrom, as indeed I had been assured, that this association is in no way in rivalry—save in friendly rivalry—of the other societies into which the members of the Bar have been formed or have associated themselves, the Law Society of Upper Canada, the County of York Law Association, and the like. I am glad, as there is room for all, to know that it is the desire and intention of this association to work with and not in opposition to or in competition with others; and, therefore, it was with no little pleasure that I accepted the invitation so kindly and so flatteringly extended to me.

When the King's patent calls one to the Bench, he can no longer be a solicitor, he ceases to be a member of the Bar, and his title of King's counsel either becomes extinct or is in abeyance, but the patent cannot take away his right to be and to call himself a lawyer—and it is by that name that here I desire to call myself and through what that name implies that I claim brotherhood with the members of this association.

We are members of a liberal and learned profession, but that need not prevent us from following the example of those

engaged in mercantile pursuits. The prudent business man from time to time takes stock. It may not be amiss for us to take stock and see precisely where we stand.

It would be supererogatory for me to speak of the position the practitioners of the law have taken in the past. Every student of history—and every lawyer should be such—knows that in the long and arduous struggle for liberty in England and in European countries the lawyer was well toward the head of every movement to advance the rights of man. The lawyer was as conspicuous in the French as in the English revolution, and before and since; and his pre-eminence was not confined to one class of public usefulness.

Is he holding his ground?

We need not inquire how it is in other countries—it is sufficient that we consider how it is in Canada—and in Ontario.

Well within my own time (and I am not an old man) it was the lawyer who in every town and village was the leader in everything of a public character—he it was to whom the people at large looked for leadership. Was a member of Parliament to be chosen? It was a lawyer who usually was the candidate or who dictated who the candidate should be. A deputation to wait upon the Government? A lawyer headed it. Any public scheme to be advocated? The advocate was a lawyer.

There can be little doubt that the advance in wealth of Ontario, and perhaps also a change in the way in which wealth is looked at, have altered this to some extent. There is more wealth and there are more wealthy men in Ontario than ever before. Manufactures, mining, successful speculation in land and in stocks, appropriation of "public utilities," have all contributed to increase wealth and the number of wealthy men; and I think, too, though that may be the thought of an ageing man, that the possession of wealth rightly or wrongly gives more importance than it formerly did.

No lawyer can make rich out of the practice of law. Some there are who have—like men in other pursuits—been fortunate in speculation, or who have in other ways and by other means outside of the practice of their profession acquired considerable wealth—but the truth stands out and may not be gainsaid that no lawyer can grow rich from the practice of his profession alone. And it is not to be forgotten that in Ontario the practitioners of the law, if they are to rely upon the tariff rates of remuneration, must be worse paid than their brethren in almost every other part of the English-speaking world.

The price of every article is increasing—the tariff which the taxing officers are called upon to apply is stationary.

Is it not the fact that where formerly the lawyer led, he is now often the follower—whose services are indeed needed, but whose leadership may not be indispensable?

The supremacy is still far from gone—but is it not going?

That question is not after all the important one—the true question for us to ask is, "Should it go?"

The profession of the law—using the word in the collective sense—was originated, it existed, and continues to exist, for the good of the public—lawyers have a monopoly of a part and no unimportant part of what in a broad sense may be called "public utilities."

The railway is organized and given extraordinary power for the public good, and it is held—rightly held—to a strict account of the manner in which it exercises the powers given it. The lawyer as lawyer exists by the grace of the State in order that he may do public service—and it is not unfair that you who have the monopoly of the conduct of cases in the Courts of law, should be held to a strict account of the manner in which you perform those duties. The Courts exist that justice may be done between man and man and between the State and man, and you are an integral part of the Court.

The practice of the law has undergone and is still undergoing a transformation, an evolution, dating back to a no very remote period.

The old family lawyer, the repositary of the secrets of the family for years, the guide, philosopher and friend of old and young, has become, largely, a thing of the past. His place has been taken by the business man, the acute pulse-feeler of the money market, who is ever on the look-out for investments for his clients, whether real estate, bank stock, or shares in a mining company. The solicitor is more in the world and less in his chambers than the old attorney-at-law, and, with perfect propriety, looks after matters which would be considered infra dignitatem by the solicitor in Chancery.

And in the other branch of the profession, the orator who brings the tears to the eyes of the juryman is rather discounted, and he is thought to be the best counsel, even in jury cases, who can quietly marshall facts and hammer them home. Our court rooms, perhaps owing to the increase of the proportion of cases tried by a Judge alone, are ceasing to be "shows;" the mass of people do not now so much as before flock to Court as to a theatre to hear oratory ore rotundo, and see acting brought to the pitch of perfection. Our trials (saving always criminal trials and others partaking of a criminal character) are for the spectator generally a weariness; dry legal questions are discussed, and counsel are not even permitted to bully a witness.

Not many years ago the assize week was a great time in every county town, and men came miles and miles to hear trials,—now assize passes after assize, and, except those interested in the litigation as parties or witnesses and those summoned as jurymen, no one pays the slightest heed. I know many regret this—many think that the glory of the Courts has departed with all this éclat. I am not of those. My theory is that His Majesty's Court is a place for doing business, and that business is the determination of the rights of those who are seeking such determination—and that the

less sentiment and feeling the better. Nothing quells sentiment and feeling like the absence of spectators to side with one or the other contestant.

My theory may be wrong; at all events it is consistent, and I hope my practice is in accordance with it.

The Court is held for determining the rights of litigants. The parties to the action being tried have a right to expect that nothing shall be permitted which will or may distract the attention of jury, witness, counsel, or Judge from the business in hand. It is their play—no one can be allowed to interfere—a Judge is in Court to hear their case, and that, for the time being, alone—the officers of the Court are there to see that nothing interferes with *their* getting justice—jury, lawyer, and witness are for them alone.

In the old English theatres, there was a custom to allow friends of the "management" or of the players to have a seat upon the stage. These outsiders often had no qualms about walking about and talking, drawing the attention of the audience to themselves, and preventing the players doing full justice to the part or receiving justice themselves. It was found necessary to put an end to this custom in the interest of player and playgoer, and now the player has in fact, as in theory, the stage. We still keep up that vicious old practice in our Courts. The only persons having a right within the bar are the Judge, the officers of the Court, the jury, the counsel actively engaged, and the witnesses under examination. Clients may be allowed, if they so desire, unless they should be excluded for special reasons. In practice we allow barristers to fill up the space within the bar, spectators to fill the jury boxes when not occupied, and rows of them sometimes to stand up, within the Bar. Many members of the Bar even are not so thoughtful as some—they walk about and talk half audibly, have no qualms about conversing half aloud with the clerk of the Court and continually distract the attention of jury and witness, sometimes of counsel and Judge. This is not only bad manners—it is worse, it is

an interference with the rights of the litigant—it prevents in some degree the Court from performing its proper function. I have again and again seen the attention of the jury straying from the witness in the box to the breezy or jolly incoming lawyer. And spectators will forget that they are spectators. I remember recently in a county town the hardly suppressed indignation when I ordered a jury box to be emptied of those who had taken possession of it, and who kept up a perpetual squeaking of chairs and exchange of whispers.

Almost equal in importance to the fair trial of actions is the belief by litigants that the trial is fair. And this the litigant cannot be expected to think unless counsel and witness have for the time being the floor to themselves. So long as members of the Bar and others are simple spectators they are of course more than welcome within the bar, but no one, barrister or otherwise, has a right to complain if, at any time, all but the players are kept off the stage. Then the people at large are the paymasters—they supply the money for the support of Courts, and they have the right to see how justice is administered. How can that be, if people are allowed to cluster around Judge and jury? The plain people must not themselves do anything to prevent the whole attention of Court and jury being fixed upon the case in hand, but they are entitled to see and to hear subject to that duty.

All men are liable to err, and, lest the audience should interfere, constables are paid to watch, and these officers should perform the duties for which they are paid, or why should they be paid at all?

Our Courts exist to do business, as I have said, and our customs and our methods should be gauged by that test, subject indeed to the rules and regulations over which the Courts themselves have no control, and to a remark which I shall have occasion to make later.

Business of the character of law suits can only be carried on under fixed forms and regulations. The standard foot

can never be again—if it was ever—the length of the Lord Chancellor's foot. Decorum in Courts is a necessity, it is a decided asset of the country. I have spoken to several lawyers, Judges amongst them, from the neighbouring republic, and I have not yet heard any other opinion than the one, viz., that it is a matter of regret that the Courts of the United States have not kept to the tradition of England in giving to Judge and counsel a distinctive uniform and prescribing certain formalities. Not for the sake of a uniform nor for the show ("fuss and feather" is the standing expression now for any kind of formality), but for the sake of the administration of justice. The business of administering justice is done better and more expeditiously, as is proved by experience, if those engaged in it have a distinctive garb; and many of the Courts of the United States of the very highest standing have adopted or are adopting the discarded gown and for business reasons. Every now and then we hear or read of some movement looking toward the abolition of the time-honoured garb. Let us in such an agitation profit by the experience of others.

The remark I said I should make is this. Business men as we all are, we should not forget that we are members of a learned and a liberal profession. Every man owes a debt to his profession, and the first part of that debt is to support its dignity so far as that does not interfere with the primary object for which the profession exists. General culture every member of our Bar must have had some smattering of—there is no reason why it should not be increased. The time of the Courts is not wasted but saved by the accurate use of language by counsel—the reputation and dignity of the profession are not lowered but raised by the choice of appropriate language. No time is saved and the reputation of the Bar is lowered by counsel speaking of a case as Smith *v.* Brown, or citing the Revised Statutes of Ontario as "R. S. O."—(I have even heard a counsel speaking of a very learned Judge now deceased as ———J.)

I will at once confess I am *jealous* for the reputation of the Bar of Ontario, and for that reason I may be unduly sensitive, but I admit that I grieve when I hear an illiterate counsel argue in illiterate language, wrongly pronounced, even if the substance of his argument is sound. But this, after all, is a very subsidiary matter. The main thing is for our Courts to earn and to deserve the confidence of the people—thus only can they stand.

And out of Court the duties of members of the Bar are not less but more onerous as time goes by, and life becomes more intricate. More and more legal principles have been and are becoming settled—a lawyer must know more. Civilization in its advance brings more and more facts upon which the legal principles must be brought to bear—a lawyer must have a greater capacity of mastering facts. We are living in more haste—a lawyer must be prompt and ready. Time is money, and a lawyer must not make mistakes, if at all avoidable. Clients must be kept from litigation, not advised into it—and the successful lawyer is he who has the best success in not issuing writs. Litigation sometimes is a necessity; the rights of individuals and corporations must be determined and asserted; fraud in all its Protean shapes must be detected and punished. Trial Courts will never entirely cease while man is a fighting animal, and there will always be enough for a competent lawyer to do. In other professions the standard is advancing. Are we going on with equal strides? Is the lawyer of to-day as much superior in information to his predecessor of 20 or 50 years ago as is the physician to his? the engineer to his? If we are to retain our present position, and perhaps to regain a little of what we have lost, the profession ma, not fall asleep, education must be thorough, a knowledge of legal principles must be so acquired as to become almost intuitive.

It is a matter of thankfulness that the reputation for honesty of the profession is not diminishing. It has been the fate of lawyers, since ever there were lawyers, to be the

butt of cheap witticisms, but no one has ever yet got into trouble, financial or otherwise, in which he must trust some one, and trust him implicitly, that he has not sought the lawyer.

That high sense of honour which characterizes our profession, united to a thorough knowledge of well established legal principles, and diligence to seek for what may not for the time be well known, must keep our beloved profession to the very fore front now as in the past.

So mote it be!

AN IMPORTANT DECISION UPON THE REAL PROPERTY LIMITATION ACT.

The Ontario case of McVity v. Trenouth (or Tranouth), which has just been finally passed upon by the Judicial Committee of the Privy Council, is of extraordinary interest, both from the difficulty of the question involved, and from the wide divergence of judicial opinion. The action was tried by the Chancellor, whose judgment is not reported, but who found in favour of the plaintiff. There was an appeal direct to the Court of Appeal (Osler, Maclennan, and Maclaren, JJ.A.) The appeal was allowed and the judgment reversed: 9 O. L. R. 105, 5 O. W. R. 123. We find this summary of the decision, with a brief comment, in 25 C. L. T. at p. 123:—

"An important and interesting question is involved in the decision of the Court of Appeal in McVity v. Trenouth, 5 O. W. R. 123. A. in 1891 conveys land to B., who goes into possession, but does not register his conveyance. A. in 1895 fraudulently mortgages the land to C., who is innocent of the fraud, and registers his mortgage. In 1903 C. brings ejectment against B., who has been in undisturbed possession since 1891. When did the right of entry (if any) of C., or of A., arise? If the statute was running in favour of B. before 1895, the mortgage did not interrupt it, for it did not confer a new right of entry: Thornton v. France, [1897] 2 Q. B. 143 (C.A.), which must be taken to overrule Cameron v. Walker, 19 O. R. 212: see Trimble v. Hill, 5 App. Cas. 342. But did the statute begin to run in B.'s favour and against whom? The conveyance to B., though unregistered, was good as between the parties, though it became fraudulent and void as against C., when he registered his mortgage, by virtue of s. 87 of the Registry Act. Mr. Justice Osler gets over the difficulty in this way: "If the deed to B. is avoided by C. for the purpose of supporting his registered title, and is to be treated as void ab initio, B.'s possession must also

be treated as having been adverse to A. from the commencement, and C., having avoided the deed for one purpose, cannot set it up for another in order to give a character to the possession which, in the absence of the deed, would not attach to it. It is gratifying to find that B. succeeds, but perhaps the last word has not been spoken. The question is so nice a one that it should be carried further."

In pursuance, no doubt, of weightier advice than this, the case was carried to the Supreme Court of Canada, where the judgment of the Court of Appeal was affirmed by a divided Court: 36 S. C. R. 455. Sedgewick and Idington, JJ., agreed with the Court of Appeal, and Taschereau, C.J.C., also agreed, but with doubt; while Davies and Nesbitt, JJ., were strongly of opinion that the judgment of the Chancellor should be restored.

Leave to appeal to the Judicial Committee was obtained, and the appeal heard in July last before a Board composed of the Lord Chancellor, Lord Macnaghten, Lord Atkinson, Lord Collins, and Sir Arthur Wilson. Mr. Henry J. Scott, K.C., and Mr. W. N. Tilley (both of the Ontario Bar) were counsel for the appellants, and Mr. R. Ruddy (of the Ontario Bar) appeared for the respondents.

Lord Macnaghten, in delivering on the 5th December their Lordships' judgment, said: "The only question in this case is which of two innocent parties is to bear the loss occasioned by the fraud of one Sootheran, a dishonest lawyer. One of the parties trusted him as a professional adviser; the other dealt at arm's length with him as an honest man. In their Lordships' opinion the question is concluded by the Act R. S. O. c. 136, s. 87. The appellants, who are mortgagees, took their mortgage from Sootheran, who was on the register as owner of the land which was mortgaged to them. The land had been conveyed to Sootheran by the female respondent on the occasion of her marriage with the other respondent, to the intent that it might be reconveyed to both. Sootheran registered the conveyance to himself.

He executed the reconveyance. But he failed to register it, and deceived his clients by producing a forged certificate of registration. The Act makes every instrument affecting lands 'void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered.' The reconveyance, being unregistered, was therefore void against the appellants, who advanced their money without notice. As between Sootheran and the respondents the deed of reconveyance was perfectly valid. And consequently, before the date of Sootheran's mortgage to the appellants no action could have been brought to recover the land. The mortgage was executed on the 30th August, 1895. The writ in this action was issued on the 12th May, 1903. The Statute of Limitations does not, therefore, afford any defence to the respondents. No other ground of defence was seriously argued before this Board. Their Lordships will therefore humbly advise his Majesty that the appeal should be allowed, and the orders of the Court of Appeal for Ontario and the Supreme Court of Canada discharged, with costs. The respondents must pay the costs of this appeal."

We note that Lord Macnaghten refers to Sootheran as "a dishonest lawyer," and it might be inferred that he was a solicitor. In the reports in 9 O. L. R. and 36 S. C. R. he is referred to as "a conveyancer," and we believe the fact to be that he was one of the class usually spoken of in Ontario as unlicensed conveyancers.

The view of the Judicial Committee will, we think, commend itself upon reason as well as authority.

The point is, perhaps, even better put by Mr. Justice Nesbitt (dissenting) in 36 S. C. R. at p. 460: "The result of the judgment of the Court of Appeal and the majority of this Court is that a person who is the legal and equitable owner in possession of land, and as to whom the Statute of Limitations cannot have any application (who has, by his own act in executing a conveyance which has been registered, enabled

an innocent party to bring into play the Registry Act), can defeat the plain language of that Act creating priority against him, by invoking a statute which had admittedly no application prior to the registration, and add a term of years as running which, in fact, was not running."

THE LATEST ONTARIO DECISIONS.*

Betting.]—Holding that the evidence brought the case within the decision in Powell v. Kempton Park Racecourse Co., [1899] A. C. 143, in that "no one of the bookmakers described in the evidence does claim to use and does use any part of the enclosure as his part exclusively as against any one," the Court of Appeal quashed the conviction of the defendants in Rex v. Moylett and Bailey, 10 O. W. R. 803.

Conspiracy.]—Upon the appeal in Copeland-Chatterson Co. v. Business Systems Limited from the judgment of Clute, J., 8 O. W. R. 888, noted ante 108, the Court of Appeal, holding that the main purpose of the defendants was to establish a busines out of which they hoped and expected to make profits and gain, and that, while they might, with the object of building up their business, have resorted to means which were unfair and wrong as against the plaintiffs, it was quite another thing to say that these means were resorted to for the purpose of destroying the plaintiffs' business, set aside the judgment at the trial, and directed a reference to ascertain the damages, if any, sustained by the plaintiffs by reason of the defendants having communicated to any other person the amount or rate of profit of the plaintiffs or the cost of production or manufacture of any commodities manufactured by the plaintiffs, obtained by the defendants other than Hoose while in the plaintiffs' employment, and also by reason of the use by the defendants in carrying on their business of patterns of sheets and records of sizes of blank sheets taken from the plaintiffs' factory, and payment of such damages, when ascertained, by such defendants to

* Short notes of the most important cases in Volume X. of the Ontario Weekly Reporter, Nos. 26, 27, 28, pp. 761 to 948, inclusive.

the plaintiffs. It was ordered that the tools in question be returned to Hoose, having been made by him in spare moments, as was the custom, and belonging to him, as was also the custom, and the action as against him was dismissed with costs: 10 O. W. R. 819.

Criminal Law.]—In Rex v. Farrell, 10 O. W. R. 790, on a motion upon habeas corpus for the discharge of the defendant, imprisoned under a conviction regular on its face. the following points were decided by Anglin, J.: (1) The Court will not, upon such a motion, re-hear the case or weigh the evidence or sit in appeal, but will examine the depositions returned upon certiorari granted in aid of the habeas corpus, to see if there is any evidence to sustain the conviction, and, if none is found, will discharge the prisoner; this is required by the language of R. S. O. 1897 c. 83, s. 5. (2) The police magistrate for the town of Brampton has jurisdiction, at the request of the police magistrate for the township of Toronto, to try a person accused of an offence committed in the township. (3) A prisoner will not be discharged because the warrant of commitment returned, by a clerical error, bears a date before that of the conviction upon which it is founded. (4) The conviction of the prisoner returned purported to be for a second offence of selling intoxicating liquor without a license, contrary to the Ontario Liquor License Act, and the sentence was four months' imprisonment as for a second offence; by s. 99 of the Act the magistrate is required to reduce to writing the evidence of the witnesses, which is to be read over to and signed by them; the depositions returned failed to shew any proof of a previous conviction: and it was held that the magistrate's affidavit that proof of the previous conviction was in fact properly given could not be accepted on the motion for discharge of the prisoner, and no evidence being returned to warrant the conviction for a second offence, which was essential to support the adjudication of imprisonment for four months, the prisoner was entitled to his discharge. (5) The

prisoner was also entitled to his discharge on the ground that he was not allowed fair or reasonable opportunity to make his defence; he was served with a summons to appear the next day after service to answer the charge; he did so; the information was then amended so as to charge an offence upon a day other than either of those mentioned in the summons; and he was refused an adjournment; all of which, as well as other things in the proceedings before the magistrate, was contrary to natural justice.——A similar case came before a Divisional Court about the same time: Rex v. Brisbois, 10 O. W. R. 869. The Chancellor, delivering the judgment of the Court, referred again to s. 5 of the Ontario Habeas Corpus Act, R. S. O. 1897 c. 83, and to Regina v. Mosier, 4 P. R. 64, and Regina v. St. Clair, 27 A. R. 308, 310, as to the power of the Court, upon habeas corpus with a certiorari in aid, to go behind the conviction and look at the depositions. This conviction, also, was under the Liquor License Act, and the discharge of the prisoner was granted because, upon the depositions returned in obedience to the certiorari, there was a complete absence of evidence upon the material point of liquor having been sold by the prisoner. By s. 99 of the Liquor License Act, the evidence of the witnesses is to be reduced to writing and read over and signed, and this was not done, so that, while there probably was evidence actually before the magistrates which would warrant the conviction, as it did not so appear, and the direct provisions of the Act had not been complied with, the discharge of the prisoner was ordered.——Overlooking the evidence of one O'Neill as to the finding of a book near the tracks in the bush leading to the body of the man the defendant was accused of murdering, the trial Judge treated the case as if a second book found 5 months afterwards by one Griffiths, and at another place, was the only one in evidence, and commented upon the assumed fact that no book had been proven to have been found where the prisoner had told O'Neill he had thrown the book from which he had taken a cheque, as

possibly reflecting upon the credibility of the prisoner's entire statement as to the provocation upon which he relied as a defence. Also in the course of his remarks the trial Judge stated that "no other book was found there which would answer the description;" and, in reply to a juryman who asked, "That is the only book?" he stated, "That is the only book which would answer the description, except Paul's own book." The Court of Appeal held that this constituted misdirection: Rex v. Paul, 10 O. W. R. 946.

Evidence.]—An appeal by the defendant in Trethewey v. Trethewey from the order of Anglin, J., 10 O. W. R. 684, noted ante 746, was dismissed by a Divisional Court, 10 O. W. R. 893. The judgment of Riddell, J., contains a full exposition of the Rules and practice as to the examination of witnesses for the purpose of making evidence upon pending motions.

Execution.]—The only matter brought out in evidence in McNichol v. McPherson, 10 O. W. R. 844, affecting the defendants McPherson and Davidson, who were execution creditors of the plaintiff, and purchased certain lands of his at a sale by the sheriff under their execution, was an arrangement between them and the other defendant, wife of the plaintiff, that if they became purchasers they would allow her the benefit of the transaction, if she so desired, on paying or securing to them the full amount of their account for costs against the plaintiff. Evidence was also given to shew that the sale price was far less than the real value of the land sold. Boyd, C., dismissed the plaintiff's action to have the sale declared invalid, holding that, the sale being under process of law, the execution creditor had a right to purchase, and was not affected by any irregularities or omissions on the sheriff's part.——For purposes of issuing execution, a judgment, authenticated by the signature of the Registrar, and marked as signed by the Clerk of the Crown and Pleas,

is held by Boyd, C., in Rossiter v. Toronto R. W. Co., 10 O. W. R. 923, to be complete, though it may not have been entered.

Executors.]—The judgment of Riddell, J., in Willison v. Gourlay, 10 O. W. R. 853, is remarkable for the comment made upon the errors of solicitors in connection with the matter, including the solicitor who advised the executors that they could not legally pay to the plaintiff (an adult) a legacy of $600, accompanied by a direction to the executors to invest the principal and pay thereout to the plaintiff with the interest $50 the first year and $15 each year thereafter. Instead of proceeding under Rules 938 et seq., an action was brought, and this by unnecessary proceedings made more expensive than it might have been. The executors are ordered to personally pay the costs of the plaintiff properly incurred, that is, such costs as would have been allowed had the cheaper practice been adopted, and do not receive an order to pay these out of the estate, nor to receive their own costs out of the estate, while it is suggested that, if the facts be as sworn to by them, they have a right of action against the solicitor who gave the advice mentioned.

Fire Insurance.]—The keeping of a small quantity of gasoline in a store for use, is held, by Riddell, J., in Thompson v. Equity Fire Insurance Co., Thompson v. Standard Mutual Fire Insurance Co., 10 O. W. R. 761, not to be an infraction of statutory condition 10 (f) of the Insurance Act, which provides that insurance companies shall not be liable for loss or damage occurring while "gasoline is kept or stored in the building insured or containing the property insured, unless permission is given in writing by the company."

Fraud and Misrepresentation.]—A novel question arose in Alexandra Oil and Development Co. v. Cook, 10 O. W. R. 781. Cook and another had, with the intention of forming a company to take over certain "oil leases," secured

these leases and procured 19 "friends" to take each a $1,000 interest in these leases and a corresponding interest in the company, on the fraudulent representation to them and to the company that the price paid for the leases was much greater than it actually was, and the question arose whether the defendants should account only for their own wrongful gain or for the whole difference in price. A Divisional Court holds that the latter amount is the true measure of the damage to be recovered, being the loss sustained by the company. It is held to be a matter of indifference that the persons who applied for incorporation and acted as shareholders and directors of the company were only nominally interested, Cook being a promoter within Gluckstein v. Barnes, [1900] A. C. 240.

Highway.]—The plaintiff in Breault v. Town of Lindsay, 10 O. W. R. 890, was injured while walking along a sidewalk in the town, by the breaking of one of the planks forming the walk. It appeared that the break was of such a character as to shew that the plank though weak was not rotten all through. While the walk was old, it did not appear that the life of the wood had run out or that any planks were loose in the sense of being kept in place by their own weight, though in hot dry weather the nails had a tendency to draw. The servant of the corporation whose duty it was to look after the board walks said that he was over this walk two days before the accident, and made fast any nails that were out of place. No witness said that the plank in question was, or appeared to be, loose or rotten before the accident. Boyd, C., in dismissing the action, said: "I think my judgment may be safely placed on this ground, that there is no evidence of defective condition in the locus in quo existing so long or so conspicuously as to fix imputed notice of the defect upon the town."

Husband and Wife.]—The Court of Appeal, in Jarvis v. Jarvis, upon an appeal from the order of a Divisional Court,

8 O. W. R. 902, noted ante 111, set aside such order, adopting the findings of the trial Judge that the plaintiff did not intend to vest the fee simple of the lands in question in the defendant, but that she should have an estate for life in the same in the event of her surviving him. The plaintiff, having amended his claim by setting up this as a fact and praying relief accordingly, the Court was freed from the difficulty, doubtless experienced by the trial Judge, from the rule that a voluntary conveyance cannot be reformed, the Court then having power to give effect to such parts of the instrument as the grantor was willing to let stand; and it was declared that the defendant was entitled to an estate in the lands for the term of her natural life, in the event of her surviving the plaintiff, and that, subject thereto, the lands were vested in the plaintiff in fee simple: 10 O. W. R. 831.

Jury Notice.]—In Clisdell v. Lovell, 10 O. W. R. 925, a Divisional Court approved Montgomery v. Ryan, 13 O. L. R. 297, 8 O. W. R. 855, noted ante 111, as regards the exercise by a Judge in Chambers of the discretion to strike out a jury notice before the trial. Anglin, J., in his opinion, which is the only one as yet reported in full, confined the application to cases to be tried at Toronto, and "to cases in which it is obvious that no Judge would try the issues upon the record with a jury."

Life Insurance.]—The judgment of the Court of Appeal in Pense v. Northern Life Assurance Co., 10 O. W. R. 826, reversing the decision of Mabee, J., 9 O. W. R. 646, 14 O. L. R. 613, upon the construction of two life policies, holding that both had lapsed before the death of the insured, seems to be so plainly right that we only call attention to it because the judgment below, now declared to be erroneous, is already reported.——The testator in Maclaren v. Maclaren, 10 O. W. R. 835, having 4 gold bond policies of life insurance in one company, each for $25,000, made a bequest to each of 4 children of one quarter of the proceeds "from a

5 per cent. gold bond policy" issued by that company. The application for the insurance on which all 4 policies were based, and a letter from the insured to the agent of the company, were offered in evidence. In the letter the testator said: "I beg to acknowledge receipt from you of policy for $100,000 on a 5 per cent. twenty year gold bond issued by the Travellers Insurance Company of Hartford, Conn. I have much pleasure in stating that I find the policy satisfactory in every respect." Anglin, J., held that the children mentioned were (even if the letter were admissible) entitled under the will at most to participate in one only of the four policies to be selected by them, and that they were not entitled to the proceeds of even one policy as preferred beneficiaries under the Ontario Insurance Act, because to hold that a bequest of one of 4 policies, any one of which might be selected to answer the bequest, was not such a designation as met the requirement of the statute that the policy should be identified by number or otherwise.——A Divisional Court in Re Shafer reversed the order of Riddell, J., 10 O. W. R. 409, noted ante 698, holding that the ordinary and also the legal interpretation to be put upon the language of the certificate, which gave the $2,000 of insurance moneys to the executors of the insured to be put at interest, and the interest to be paid to his wife for the benefit of herself and children, but, in case of her death or marriage, the interest to be paid to his children until the youngest should become of age, when the principal was to be equally divided among them, is, applying to this provision (testamentary in its character) the authorities upon wills, that the widow should receive the interest and apportion it according to her own judgment and discretion, among herself and children, according to their various needs, and that the son should not receive payment of his one-sixth interest until the period of distribution mentioned in the certificate. The provision is held to be outside the scope of s.-s. 7 of s. 159 of R. S. O. 1897 c. 203: 10 O. W. R. 865.

Liquor License Act.]—The decisions of Anglin, J., in Rex v. Farrell, 10 O. W. R. 790, and of a Divisional Court in Rex v. Brisbois, 10 O. W. R. 869, upon habeas corpus and certiorari in aid, are noted above under the heading "Criminal Law."

Mechanics' Liens.]—An appeal by the plaintiffs in Canada Sand Lime Brick Co. v. Ottaway from the order of the Master in Chambers, 10 O. W. R. 686, noted ante 748, was dismissed by Anglin, J.: 10 O. W. R. 788.

Municipal Corporations.]—In Faulkner v. City of Ottawa, the Court of Appeal (Osler and Garrow, JJ.A., dissenting), allowed an appeal by the defendants from the judgment of Teetzel, J., 8 O. W. R. 126, and dismissed the action, because the sewer, the backing of whose waters into the plaintiff's basement occasioned the damages sued for, was constructed, as to capacity, according to the engineering rule then in vogue, though the rule now is for a greater capacity, and, while new pavements and sidewalks had altered the conditions so as to render the greater capacity necessary, the plaintiff's damage was not due to these deficiencies, but to the extraordinary and unusual character of the rainfalls, and the abnormal strain thus put upon the sewers, at the times mentioned: 10 O. W. R. 807.——Upon consideration of the authorities it is decided by Clute, J., in Butler v. City of Toronto, 10 O. W. R. 876, an action in which it was sought to recover damages for the death of the plaintiff's daughter while a patient in the Isolation Hospital in Toronto, conducted under the Public Health Act, R. S. O. 1897 c. 248, by reason of her being permitted to expose herself to infection from other diseases than that which was the occasion of her being in the hospital, as was alleged, by the negligence of the defendants, that the officers and servants in charge of the hospital are not servants of the defendant corporation in such a sense as to render the corporation liable for their negligence, and that, even were the corporation responsible

for the acts of those officers and servants, an individual who has suffered injury can maintain no action for nonfeasance, and that the statement of claim charged no misfeasance.—— The ruling of Boyd, C., in Chambers v. Winchester, 10 O. W. R. 909, is that a commissioner under the Ontario statute providing for inquiries into public matters, R. S. O. 1897 c. 19, is at liberty, having the absolute power of regulating the proceedings of his own tribunal, so long as he keeps within his jurisdiction, to call as a witness first the party whose conduct as a public officer is under investigation. It is also decided that the commissioner, who decides nothing affecting the legal rights of the parties, is not, pro hac vice, a judicial person, and is not, therefore, within the ambit of judicial, quasi-judicial, or administrative officers who become disqualified by interest or bias, and that, as a consequence, by analogy to the proceedings in case of a royal commission, the application for redress, should the commissioner become unworthy of confidence, should be directed to the appointing power, the municipal council.

Stay of Proceedings.]—After issue joined and notice of trial given, the defendants in Cole v. Canadian Fire Insurance Co., 10 O. W. R. 906, applied for a stay of proceedings, which was granted by Meredith, C.J. A Divisional Court reversed this decision, holding that, since insurers and insured come, as respects a policy containing or subject to clause 16 of the statutory conditions, within s. 6 of the Arbitration Act, R. S. O. 1897 c. 62, which provides that the Court may stay proceedings after appearance and before pleading or any other step in the proceeding, the application was made too late.——In Cole v. London Mutual Fire Insurance Co., 10 O. W. R. 930, the defendants had substituted for condition 16 of the statutory conditions a clause providing for an appraisement instead of an arbitration, and, after delivery of their defence, applied for a stay, which was refused by Teetzel, J., because, if the defendants must rely upon condition 16, their application was made too late,

and because they could not rely upon the substituted condition, as it was not one that was just and reasonable to be exacted by the company, inasmuch as the plaintiff under it would be bound by the personal opinions of a majority of the appraisers without being at liberty to call witnesses and have them examined on oath, and would also be bound to pay, in any event, certain expenses of the appraisement, terms more stringent and onerous than are imposed by the statutory conditions.

Trusts and Trustees.]—The plaintiff in Parker v. Tain, 10 O. W. R. 548, sought to recover possession of land; and the defendant, by way of counterclaim against the plaintiff and the plaintiff's grantor (her son), alleged that the latter held and conveyed the land subject to a trust in her (the defendant's) favour; and also that his conveyance to the plaintiff was voluntary and without consideration and made for the express purpose of defeating and delaying the defendant and the other creditors of the son, and was fraudulent and void; but the defendant did not directly allege that she was a creditor, nor did she state that she counterclaimed on behalf of all creditors. It was held by a Divisional Court (affirming the decision of Boyd, C., 10 O. W. R. 36), that, the trust, if there was any, resting in parol, there was nothing to take the case out of the Statute of Frauds, and it necessarily failed; and also, that if a counterclaim could be asserted on behalf of the defendant and all other creditors of the grantor, the two claims could not be joined in one action or counterclaim; and leave to amend should not be given to enable the defendant to abandon the claim to enforce the trust, and proceed upon the other claim on behalf of all creditors; but the dismissal of the action should be without prejudice to any action which the defendant might bring to set aside the conveyance.

Vendor and Purchaser.]—An appeal by the plaintiff in McGuire v. Graham from the judgment of MacMahon, J.,

10 O. W. R. 370, noted ante 605, was allowed by a Divisional Court because, in the circumstances, the cases cited upon the question of the duty of an agent to his principal are deemed not to apply to the facts in this case. Furthermore, the vendor's solicitor became aware the first working day after the agreement was made of the position of Hill, yet, two days afterwards, he sent a draft conveyance: 10 O. W. R. 863.

Will.]—The disposition which gave rise to the question in Re Silverthorn, 10 O. W. R. 798, whether Elizabeth A. Silverthorn was entitled to an absolute interest or only a life estate in the realty of her deceased husband, was: "To my dear wife Elizabeth A. Silverthorn I give and devise all my personal estate of every description for her own use and that my landed property and the balance that may be coming due on the Samuel Silverthorn mortgage shall be disposed of after the death of my wife, and shall be made into 15 parts, of which 15 parts each of my sons shall receive two fifteenth parts and each of my daughters one fifteenth part, and that for as long as my wife Elizabeth A. Silverthorn lives, she shall have the use of the landed property, and either use it, rent it, or sell it, and use the money as she thinks best." Anglin, J., decided in favour of the life interest, because otherwise the careful disposition to be effectuated on the death of the wife would have to be discarded, while the words "as she thinks best" might be referred to the widow's option to use the property, or rent it or sell it, any one of which she might do "as she thought best."——The question in Re Coy, 10 O. W. R. 884, was whether a gift to the testator's wife of $1,000, absolutely, followed by a gift to her of the testator's realty and of the use of his personalty for life, subject to two legacies, and a gift, on the wife's decease, of all his real and personal estate to a son, daughters, and grandson, all followed by a general residuary clause, lapsing by the decease of the wife in the testator's lifetime, would fall into the particular residue

of the property in which the wife had been given a life interest, or into the general residue of the personalty. Notwithstanding the strong leaning of the Courts against such a construction of a will as tends to a partial intestacy, Anglin, J., inclined to the latter view, because in the bequest of personalty to the wife for life and in the gift of personalty to the children and grandchild (both subject to the same deductions) the testator intended to deal with the same property, and this is confirmed by the general residuary clause. ——It is decided by Boyd, C., in Re Battershall, 10 O. W. R. 933, that the words "all above legacies to be paid in full one year after my decease," after certain bequests in a will, positively and clearly established that it was the intention of the testator that these bequests should not abate ratably with the other bequests. A revocation by codicil of a legacy and the gift of a smaller sum "in lieu thereof, to be paid 3 months after my decease," is held to take this gift out of the preference, and a gift "in addition" to one included in the preferential class does not obtain a preference. It is also decided that the Mortmain and Charitable Uses Act, 1902, 2 Edw. VII. c. 2, s. 8 (ii), does not invalidate a devise of lands for park purposes contained in a will made within 6 months prior to the testator's death, this Act not being intended to disturb any existing licenses or statutes authorizing holding lands in perpetuity, but to extend the power to other cases.

CASES FROM WESTERN CANADA.*

Assessment and Taxes.]—Two points are decided by Mathers, J., in Ponton v. City of Winnipeg (Man.), 6 W. L. R. 730: first, that a resolution of the council of the city of Winnipeg that lands purchased by the city at a tax sale be reconveyed to the plaintiff, the previous owner, on payment of the back taxes, interest, and costs, followed by a tender by the plaintiff of the amount of such taxes, interest, and costs, did not, in the absence of a by-law, constitute a contract binding upon the defendants; and, second, that the assessment of the lands in question to the plaintiff and a demand for taxes did not work an estoppel upon the defendants, because the assessment commissioner and the tax collector, in the performance of their duties as such, were not the agents of the city corporation in the sense that the corporation would be estopped by their acts.

Certiorari.]—It is decided by the full Court in Rex v. Canadian Pacific R. W. Co. (N. W. P.), 6 W. L. R. 620, that notice of an application for certiorari to bring up a conviction, need not be served upon the justices who made the conviction.

Contract.]—An appeal by the defendants from the judgment of Craig, J., in McDonald v. Winaud (Y.T.), 6 W. L. R. 151, noted ante 612, was dismissed by the Court en banc: 6 W. L. R. 653.

Deed.]—After the plaintiffs in Huggard v. Ontario and Saskatchewan Land Corporation (N.W.P.), 6 W. L. R. 645, had signed and sealed a certain release, it was left with the defendant Scott, who, as well as being one of the releasors, was the secretary of the defendant corporation, the releasees. Apart from the fact that it appeared that the lat-

* Short notes of the most important cases in Volume VI. of the Western Law Reporter, No. 6, pp. 585 to 740, inclusive.

ter had actually accepted and acted upon the release, it is held by Newlands, J., that it had been properly delivered and took effect immediately upon its receipt by Scott.

Estoppel.]—In Simon v. Sinclair (Man.), 6 W. L. R. 638, it is decided by Perdue, J.A., that the failure of the defendant Omand to enter a defence to an action against him upon a promissory note purporting to be indorsed by him, the indorsement not having in fact been made or authorized by him, where his failure to defend was due to mistake, could not estop him from denying that a similar indorsement upon another note between the same parties, made after judgment had been signed without his knowledge in the action mentioned, was genuine.——It was contended in Swanson v. Mollison (Alta.), 6 W. L. R. 678, that the plaintiffs, claimants for a lien for work done on the defendants' property, as sub-contractors, having, after the failure of the chief contractor, and his admission of his inability to complete his contract, misstated the amount of their claim by alleging that it was much less than it afterwards proved to be, were estopped from denying that their claim was for the amount stated. This contention was overruled by Stuart, J., because there was nothing to shew that the defendants intended to rely upon the statement mentioned, and to alter their position in consequence thereof, and, as a fact, their position was in no way altered to their disadvantage by anything that occurred at that time.

Landlord and Tenant.]—The ruling of Dugas, J., in Re Fuller and Cuthbert (Y.T.), 6 W. L. R. 717, is that a landlord proceeding under s. 477 of the Judicature Ordinance, is limited to the recovery of possession of the demised premises, and cannot in such a proceeding recover mesne profits.

Lien.]—The effect of s. 9 of the Miners' Lien Ordinance is held by Craig, J., in Drabeson v. Thompson (Y.T.), 6 W. L. R. 587, to be that, no matter what agreement is made

between mine owners and labourers and wood suppliers, with respect to payment for labour performed or wood furnished between the 1st November and the 30th April in the following year, such labourers and wood suppliers still have a right on non-payment to acquire a lien by registering their claims within 30 days after the 30th April. The effect of s. 6 of the Ordinance is held to be that all mortgagees, save those registered prior to the passing of the Ordinance, shall be affected by the lien to the extent of one-half the interest in the claim.

Lord's Day Act.]—The full Court in Rex v. Canadian Pacific R. W. Co. (N.W.P.), 6 W. L. R. 620, quashed the conviction of the defendants because the evidence adduced at the hearing did not shew that the leave of the Attorney-General for Alberta had been obtained before the prosecution was commenced. It was held that, as the question went to the jurisdiction of the magistrates, new evidence could not be taken upon this point.

Mechanics' Liens.]—With the exception of some "beam filling" and "pointing," which was done on the 19th December, the plaintiffs had completed their work upon the defendants' building prior to the 19th November, on which day the defendants' architects wrote the contractor saying that the mason and brick work on the building was quite satisfactory, and, with the exception of one or two minor items, was complete. It was said, by Stuart, J., in Swanson v. Mollison (Alta.), 16 W. L. R. 678, that, were the time limited by the present Act for filing a lien 31 days from the "completion of the work," instead of from the time the claimant shall have "ceased from any cause to work thereon or place or furnish the materials therefor," he would, in the circumstances, hold that, prior to the performance of this filling and pointing, the work had not been substantially completed. The law is held to be correctly stated in Wallace on Mechanics' Liens, p. 150, with respect to the rights of a claimant who has taken on account of his claim, and nego-

tiated, a promissory note, it being a much more reasonable principle that, if the claimant has paid the note and is the holder thereof at the time he begins proceedings, his having negotiated the note will not take away his lien, than that propounded in National Supply Co. v. Horrobin, 16 Man. L. R. 472, 4 W. L. R. 570. Quære, as to the effect where the note is not given by the owner, but by the chief contractor to a sub-conctrator, the claimant. It is further decided that the words "owing and payable" in s. 32 of the Act are not limited to moneys owing and payable at the time of the commencement of the proceedings, but refer to the total sum which becomes owing and payable to the contractor during the progress of the work.

Mines and Minerals.]—The decision of Craig, J., in Yukon Consolidated Gold Fields Co. v. Schmidt (Y.T.), 6 W. L. R. 592, is to the effect that the present regulations affecting the disposal of water, being in force at the time of the staking of the defendant's quartz claim, affected that claim, more particularly because the patent therefor had not issued, the defendant being in possession under a license of occupation, with the right to secure a patent (which when issued would be subject to s. 53 (c) of the Mining Act), upon certain terms fixed and specified by the regulations. and that, whether the quartz regulations do or do not provide for a right of entry on the part of the Crown or the Crown's grantees for water ditches, the grants of stakers of quartz claims are subject to the regulations.——It is decided by Craig, J., in Re Morrison (Y.T.), 6 W. L. R. 606, that purchasers for value from the grantee of a minig claim, re-recorded under s. 41 (a) of the old regulations, prior to its expiry date, for the convenience of such grantee, cannot claim, having presumably knowledge of an Act of Parliament imposing a larger fee for re-recording claims, to be innocent purchasers for value without notice of the claim of the Crown for the sum necessary to make up such larger fee. In any case, it is pointed out that the decision in The

King v. Kappelle is to the effect that a renewal grant must be subject to all regulations in force at the date when it comes into operation. Without deciding whether the mining recorder had an absolute right to refuse a subsequent renewal grant until the sum mentioned be paid, it is decided that the Court should exercise its discretion against the granting of a prerogative writ of mandamus to compel him to do so, and thus protect the Crown revenue.——In Hocking v. Wenzell (Y.T.), 6 W. L. R. 658, the Court en banc reversed the judgment of the Gold Commissioner setting aside a grant of a placer claim, on the ground that not sufficient work had been done to represent the claim under s. 41, s.-s. 2, of the Placer Mining Act. It was held by Craig and Macaulay, JJ., that the plaintiff, in tying his stakes to stakes on the ground, instead of fixing them in the ground, had failed to comply in this respect, as he had also failed in every other, with the requirements of s. 25 of the Act, and it was also decided by Dugas and Macaulay, JJ., that whatever doubt existed under the old regulations, now, by s. 44, any one who wishes to take advantage of the default of the owner of a claim must, before locating, make his claim good by having the forfeiture pronounced, and this only by leave of the Commissioner previously obtained.

Municipal Corporations.]—An appeal by the plaintiff from the judgment of Harvey, J., in Clark v. City of Calgary (N.W.P.), 5 W. L. R. 292, noted ante 284, was dismissed by the full Court: 6 W. L. R. 622.——A municipal corporation, it is decided by the full Court in Re Moloney and City of Victoria (B.C.), 6 W. L. R. 627, has not power to pass a by-law requiring the closing of saloons on week days except between sunset and sunrise, and on Christmas day, and has no power to pass a by-law dealing with the closing of hotels. The power to enact that a licensee against whom complaints have been made may be required to apply for a renewal of his license is held to be conferred by s.-s. (d) of s. 205 of the Act. The prohibition of the supplying liquor to females

is held to be intra vires of the city council, provided such prohibition be limited to supplying liquor to be consumed on the premises, but not otherwise.

Railway.]—In Carr v. Canadian Northern R. W. Co. (Man.), 6 W. L. R. 720, it appeared that the plaintiff had, after a failure to agree, handed the defendants' agent a written statement of the terms upon which they could acquire a portion of his lands for their right of way, at the same time intimating that entry into possession of this portion by the defendants would be considered as an acceptance of the offer. The defendant entered into possession, and afterwards the plaintiff was apprised of the fact that they did not propose to accept the plaintiff's terms. They had not filed their plans and book of reference, as required by the Railway Act. Mathers, J., held that there had been an acceptance of the plaintiff's offer by the conduct of the defendants in entering into possession, which could only be referable to a contract, and that this entering into possession was sufficient to satisfy the Statute of Frauds.

Woodmen's Liens.]—The taking of an order by the claimant from his debtor, upon the consignee of timber, which the latter refuses to accept, is held by Dugas, J., in Munroe v. Cameron (Y.T.), 6 W. L. R. 703, not to be a waiver of the right to file a lien under the Woodmen's Lien for Wages Ordinance, in respect of work done upon such timber.

Will.]—The full Court in Re Sandison (N.W.P.), 6 W. L. R. 615, hold that a direction in a will to the testator's executors to divide his estate among his children and pay each one his share on attaining the age of 21 years or marrying, is not distinguishable from a direction to pay a fund to a certain class in equal shares on attaining a certain age, and, therefore, that the period of the vesting of the interests of all the children was postponed until they respectively attained the age of 21 years.

DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.*

Banks and Banking.]—One of the claims investigated by the Judge in Equity in Randolph v. Randolph (N.B.), 4 E. L. R. 17, was that of the defendant Randolph, on behalf of the People's Bank of Fredericton, to a lien on lumber or the proceeds of it in respect of an advance made by the bank to a lumber dealer for his lumber operations of 1903-4; in May, 1904, he made an assignment for the benefit of creditors. The security was taken in the name of Randolph. Barker, J.: "There is no question . . . that the bank did make the advance . . . on the security given to Randolph, and that the security was taken, for the bank, to secure this advance, and for that purpose alone. This was in contravention of s. 76 of the Bank Act, and therefore the security is void: Bank of Toronto v. Perkins, 8 S. C. R. 603. I think it makes no difference whether the bank take the security direct or through the medium of a third person, as here:" McLeod v. Vroom, N. B. Eq. Cas. 131.

Criminal Law.]—A useful distinction is pointed out by Russell, J., in Rex v. Reid (N.S.), 4 E. L. R. 12. The defendant was tried before a magistrate on two charges, one of assault and one of pointing a firearm at the complainant. Both charges were tried before any decision was given on either of them; and the magistrate then proceeded to convict the defendant for the assault and acquit him on the second charge. Upon habeas corpus it was contended that this was illegal, The Queen v. McBerney, 3 Can. Crim. Cas. 339, and The Queen v. Burk, 8 Can. Crim. Cas. 14, being cited. Russell, J., referred to the English cases Hamilton v. Walker,

* Short notes of the cases in Volume IV. of the Eastern Law Law Reporter, No. 1, pp. 1 to 52, inclusive. This number contains no cases from Quebec.

67 L. J. M. C. 135, and Regina v. Fry, 19 Cox C. C. 135, and said: "I think that under the English decisions I am justified in holding that where the offence was clearly proved and no evidence was offered in exculpation, I am not bound to hold the conviction bad on account of the irregularity in trying both cases together, simply because of the shadowy possibility that the judgment of the magistrate may have been influenced against the prisoner by the examination in his own defence on the second charge, and his cross-examination by the counsel for the prosecution." In other words, it may be shewn or presumed that the convicting magistrate was not in fact influenced by the evidence on the second trial.—In the same case it was held that in order to acquire jurisdiction to deal summarily with a case a magistrate need not, in asking the prisoner to elect the forum, name the date of the next sittings of the higher court. The magistrate asked the prisoner whether he "consented that the charge should be tried by (the magistrate) or should be sent for trial by jury at the next ensuing sittings of the Supreme Court of criminal jurisdiction at Halifax," and that was held sufficient.

Dower in Partnership Lands.]—Where certain lands were given by their father to two brothers who were in partnership in the lumber business, the gift not being upon any conditions, and not with any intention that the lands should be absorbed in the partnership business, and, though the partners did use the lands in carrying on their partnership business, they did nothing to indicate any intention, and in fact never had any intention, of altering in any way the tenancy in common created by the conveyance made to carry out the gift of their father, their wives were held by Barker, J., entitled to dower in the lands: Dunn v. Dunn (N.B.), 4 E. L. R. 15. The principles by which real property owned by partners as part of the partnership assets becomes converted into personalty, as an incident of the partnership, are fully stated in In re Cushing, 1 N. B. Eq. 102.

Landlord and Tenant.]—In Randolph v. Randolph (N.B.), 4 E. L. R. 17, the Judge in Equity has written a long opinion upon the claim of the landlord of an insolvent to have insurance moneys collected by the tenant's trustees applied in replacing upon the demised premises buildings and machinery destroyed by fire. The lease contained no covenant to insure, but there were two covenants by the lessee upon which the lessor relied as giving him an equitable interest in the insurance money. One was that none of the mill property or machinery should be removed from the demised premises without the written consent of the lessor, and if any of the agreements or covenants should be broken or unfulfilled, the mill property and machinery should be held by the lessor "as a lien for the due performance of every and all such agreements or covenants and for any damage sustained by the breach thereof." The other was to yield possession of the demised premises and all of such buildings and erections as might be put upon the premises by the lessee, at the expiration of the lease, and that all buildings should immediately thereupon become the property of the lessor, and should not be removable by the lessee, who agreed to leave the buildings in as good repair as they then were, etc. The mill building and machinery were totally destroyed by fire, and the boilers and engine and their connections were damaged. There was no insurance on the mill buildings, but the boilers and engine were insured in the names of the lessee's trustees, who received in settlement of the loss of the machinery $6,500 and $500 for damages to the engine and boilers. It was contended that s. 83 of 14 Geo. III. c. 78 (Imp.) was in force in New Brunswick, and that by it the landlord had a right to have the insurance money applied in rebuilding. Barker, J., was inclined to hold that the Act was not in force; but, even if it were, he thought it had no application, because engines, boilers, and machinery could not be said to come under the description of buildings or houses, especially where by the terms of the

lease they were removable; and secondly because, under s. 83, notice must be (and had not been) given to the insurers before the money is paid over to the assured. The argument that the landlord had an equity as against his tenant, attaching to this fund, which entitled him to have it expended in making good his covenants, was also declared to be untenable.

Promissory Notes.]—The principal point decided by the full Court in International Harvester Co. of America v. Grant (P.E.I.), 4 E. L. R. 1, was that a document beginning in the form of a promissory note, but with a long rider attached, to the effect that the note was given for a part of the price of a machine, and setting out the terms of payment, the consequences of default, etc., was, notwithstanding the rider, a promissory note. Fitzgerald, J., who delivered the judgment of the Court, reviewed the authorities, English, Ontario, New Brunswick, and Manitoba, and said: "A correct statement of the law in this matter would appear to me to be, that, though by the agreement the title is to remain in the vendor until the notes for the price are paid, that does not necessarily import that the transaction is a conditional sale, and if you find, as in the document before us, every element of a sale and transmission of ownership, despite the provision that the title is to remain in the payee until payment, this is in effect nothing more than a reservation of the title as security for payment, collateral to the notes—a short form of chattel mortgage, leaving the promise of the maker undisturbed. . . . I deduce . . . from all the authorities cited a consensus of opinion that the documents in this suit, notwithstanding the agreements contained therein, are promissory notes and negotiable securities under the rules of the mercantile law."

Water Rights.]—A statutory authority to build a dam and operate an electric light plant is no authority to permanently injure your neighbour's property, or subject it to

a continuing nuisance, unless such a result cannot be avoided, and the onus of shewing that is upon the party claiming the right: per Barker, J., in Brown v. Bathurst Electric Light Co. (N.B.), 4 E. L. R. 28. The plaintiff was the owner of a water power grist and carding mill situated on the Tetagouche, a floatable but not a navigable stream. The plaintiff's mill had been in operation for about 40 years. The defendants were a company incorporated by 4 Edw. VII. c. 71 (N.B.), and under the authority of that Act they erected a dam across the river about two miles above the plaintiff's mill, and set up an electric plant, which they operated by means of the water power. The plaintiff's chief complaint was that the defendants made an unreasonable and illegal use of the water, by which he was deprived of the right to use it for his mills, and in that way sustained a serious loss. The question of fact as to the unreasonable use of the water was found by the learned Judge in Equity in favour of the plaintiff, and the law was laid down as above. Both an injunction and damages were awarded.

EDITORIAL REVIEW.

The Ontario Bar Association.

The object of the Association is declared to be "to facilitate the administration of justice, to promote reform in the law and in procedure, to uphold the honour and dignity of the profession of the law, to bring about united action by the profession, and to encourage interchange of ideas and social intercourse among the members of the profession in Ontario." The first annual convention was held at Osgoode Hall, Toronto, on the 29th November last. The president, Mr. A. H. Clarke, K.C., M.P., of Windsor, delivered his inaugural address, which was followed by a paper from Mr. Justice Riddell, which will be found in extenso in this issue. Papers on Law Reform, a subject which is receiving just now a good deal of attention from the lay press, were read by Dr. N. W. Hoyles, K.C., and Dr. E. D. Armour, K.C., of the Osgoode Hall Law School. Discussion of a practical nature ensued. A successful dinner was held in the evening.

Ontario Law Reporters.

The staff of barristers who prepare the Ontario Law Reports has lost a member of 25 years' standing in the person of Mr. George A. Boomer, who has voluntarily retired. Ever since the reduction of the number of reporters from six to four, Mr. Boomer has felt the work to be too heavy for him, and his resignation was sent in some time ago, but was only recently accepted. He was an excellent reporter, most accurate and painstaking in all his work. He has been succeeded by Mr. Goodwin Gibson, a well known barrister, who is by training and temperament excellently suited for the work, the nature of which is not generally understood, even by lawyers. The Benchers of the Law Society of Upper Canada are to be congratulated upon their selection of a successor to Mr. Boomer. We understand that there were very few applicants for the position—a sign of the times.

Alimony and Penal Servitude.

A curious question was raised in England before Mr. Justice Bargrave Deane on an application by a wife for alimony, which was whether a woman in penal servitude was entitled to demand an inquiry in order to obtain an order for permanent alimony. As long ago as 1863 apparently, the same point was raised in a case of Kelly v. Kelly, 4 Sw. & Tr. 227, and there it was held that felony and imprisonment and maintenance by the county and forfeiture of all the felon's property to the Crown was no ground for refusing an order for alimony, and it was there pointed out that a wife in gaol would have no means of contesting a suit without alimony, but the Crown might take it if it chose. However, as Mr. Justice Bargrave Deane stated, the wife in that case was only sentenced to six months' hard labour, and the report did not shew how much was unexpired at the date of the application, whereas in Leslie v. Leslie, the case before him, the wife had received a sentence of five years' penal servitude in July last, and in refusing the order for the present, and ordering it to stand over until two months before the expiration of the wife's sentence, he pointed out that many circumstances might occur before the wife needed alimony, which would render an inquiry at the present time useless. Leave to appeal was given, but it would seem that the decision is a correct one, for, if an order was made now, the alimony would merely accrue for the wife's benefit. That is not the object of alimony, which is provision for enabling the wife to live, and to support her, if she is without means, in the rank of life to which she is accustomed.—(The London *Law Times*.)

From the Dock to the Bench.

The circumstance has been recalled in the columns of the lay press that the late Mr. Arthur Russell, Judge of County Courts, and a son of the late Lord Russell of Killowen, was in early years as an undergraduate at Oxford arrested by the police and charged with participation in a town and

gown riot, of which his innocence was conclusively proved. The incident has been related as one of the few occasions of the arrest and trial on a criminal charge of a person subsequently destined to fill a judicial position. The most remarkable instance of a transition from the dock to the Bench is undoubtedly that of the Hon. Spencer Cowper, a Justice of the Common Pleas, a younger brother of Earl Cowper the Lord Chancellor, and the grandfather of William Cowper the poet. Mr. Cowper in 1699, seven years after his call to the Bar, was, with three other members of the Bar, tried before Mr. Baron Hassell, at the Hertford summer assizes, for the murder at Hertford of Sarah Stout, whose body was found in the river. There was absolutely no direct evidence, the prosecution relying chiefly on the argument that, as the body had floated, the girl must have been put into the water after death, and therefore had not drowned herself. Evidence in contradiction of this assumption was given by the famous physicians Garth and Hans Sloane. The prisoners were acquitted, their innocence having been established beyond all doubt. Cowper subsequently was a member of the House of Commons, Attorney-General to the Prince of Wales, Chief Justice of Chester, Attorney-General for the Duchy of Lancaster, and eventually in 1727, the year of his death, one of the Justices of the Court of Common Pleas.—(The London *Law Times*.)

A Matrimonial Tangle.

Rarely, we suppose, has such an extraordinary matrimonial tangle been before the Courts as that disclosed in the recent case of Ogden v. Ogden before the Court of Appeal in England. In 1898 the respondent married in England a domiciled Frenchman, and, in the following year, the father of the French husband instituted proceedings in the French Courts for a decree of nullity, on the ground that his son at the time of the marriage was under the age of twenty-five, and so had not reached the age at which he could lawfully marry without the parents' consent, and that consent

had not been given, and the French Court declared the marriage null on those grounds. Subsequently the French husband married again, and the wife thereupon took proceedings in England for divorce, on the grounds of desertion, bigamy, and adultery, and asked either for a decree of divorce or for an order that the French decree was a valid and effective one. The late President, Sir Francis Jeune, as he then was, who tried the petition, refused to grant a decree of divorce or to make the order asked for. After that the wife married the present petitioner, Ogden, who now brought a suit for a decree of nullity, on the ground that the respondent was still, according to English law, the lawful wife of the French husband. Mr. Justice Bargrave Deane, who tried the case, held that the husband was entitled to a decree, and this decision has been upheld by the Court of Appeal. We do not doubt, says the London Law Times, that the decisions are good law, having regard to the decided cases and to the well-known principles of law that govern the difficult question of domicile in matrimonial cases; but, at the same time, when the matter is considered from a common-sense point of view, it is difficult to understand how the respondent can be considered to be a wife in England and not a wife in France. It would seem, however, from the exceedingly erudite judgment delivered by Sir Gorell Barnes as the judgment of the Court of Appeal, that the true solution of the whole matter was to be found in the fact that, owing to the decree of nullity in the French Court and the subsequent marriage of the French husband, the late President ought to have entertained the suit for divorce. As he states: "If the country of the husband's domicile refuses to recognize the marriage, and therefore cannot and will not entertain a suit for divorce against him, the justice and reasonableness of the international rule cease to be apparent, and, the wife having no right of suit whatever against the husband in his country, and having been left in the country of her original domicile where the marriage was celebrated and is recognized

as binding upon both her and him, it would seem reasonable to permit her to sue in the latter country for the dissolution of the tie which is recognized therein, though not in the foreign country." Sir Gorell Barnes points out that in this way no general rule of law would then really be infringed, and justice would be done. This, of course, is poor consolation to the present respondent, and it is to be hoped that this case will be taken as a definite pronouncement in the future in matters of this kind, although on this point the observations of the Court of Appeal are obiter dicta.

Death of Mr. Justice Kekewich.

The London Times records the death of Sir Arthur Kekewich early in December. An operation was performed for appendicitis, but Sir Arthur never recovered from the effects of the anæsthetic. Born on the 26th July, 1832, Arthur Kekewich was the second son of Mr. Samuel Trehawke Kekewich, Peamore, Exeter. The late Judge was sent to Eton and thence to Balliol. In 1858 Kekewich married a daughter of Mr. James William Freshfield the younger, of the great firm which have been for two or three generations solicitors to the Bank of England. In the same year he was called to the Bar by Lincoln's Inn. In course of time he acquired one of the largest junior practices at the Chancery Bar, and became junior standing counsel to the Bank of England. He took silk in 1877—the same year as the late Speaker—and at that date his forensic career may almost be said to have closed. He never acquired a firm footing in any Court, and the Bank of England, whose leading counsel he had become, was almost his sole client. Nor was he more successful in politics. Standing for Coventry, in 1880, he was bottom of the poll. Then, in 1885, standing for the Barnstaple Division, he was about 800 behind the late Mr. Pitt Lewis, Q.C. In the Michaelmas sittings of 1886 the venerable Vice-Chancellor Bacon, then in his 89th year, retired, and Mr. Kekewich was made a Judge.

The late Judge could not, by the utmost stretch of partiality, be described as one of the strongest; but he was somewhat undervalued. True it is that there were more appeals from his decisions than from those of his colleagues, and reversals were somewhat more frequent. But he was exceptionally expeditious, and decided far more cases than most of the Chancery Judges; and in that important but unseen work which is done in Chambers the late Judge gave great satisfaction, and his quasi-paternal duties were admirably discharged. Moreover, his judgment was on occasion restored by the House of Lords after having been reversed by the Court of Appeal.

Mr. Justice Kekewich decided several well known trade-mark cases, and his view that "Bovril" is a word permissible as a trade mark, not descriptive of the goods sold, was approved by the Court of Appeal. In the case of "Solio" as applied to photographic materials the decisions both of the learned Judge and of the Court of Appeal that it was not an "invented" word and therefore inapplicable as a trade mark, were reversed by the House of Lords. If the late Judge had been content to slacken his pace and to prune his words, he would no doubt have been much less frequently reversed, for his ability and knowledge constituted a full equipment for a Chancery Judge.

Speed in Appointments to the Bench.

We quote the following remark of the London Law Times as shewing how such things are regarded in England. A delay of two weeks strikes us here as not a delay at all. What would the London journalist say to two years? "A fortnight has now elapsed since the deaths of Mr. Justice Kekewich and Judge Russell, and, at the time of going to press, neither vacancy has been filled up. It is true that in the one case a deputy Judge has been appointed to carry on the work of the County Court, but, while we agree that full deliberation is only right and proper before their successors are appointed, any protracted delay is to be deplored."

Recent American Decisions.

Carriers.—A railway company are held, in St. Louis, I. M. & S. R. Co. v. Renfroe (Ark.), 10 L. R. A. (N.S.) 317, not to be able to escape their duty of keeping a refrigerator car necessary for the transportation of fruit properly iced by securing the car from independent contractors and delegating to them the duty of icing the car.

One who undertakes to ride on the running board of a street car, outside of the lowered bar, is held, in Harding v. Philadelphia Rapid Transit Co. (Pa.), 10 L. R. A. (N.S.) 352, to be negligent per se, and to have no right to recover for injuries incident to his position, whether he could have got to a safer position or not.

An electric railway company are held, in Tietz v. International R. Co. (N.Y.), 10 L. R. A. (N.S.) 357, not to be answerable for injury to a passenger of unusual size, due merely to the conductor's assent to the proposition and failure to warn him, when he announces his intention to change his seat by means of the running board of a moving car, of the danger from trolley poles located so near the track that the passenger's body cannot pass between them and the car, although the passenger is not familiar with the road, if that fact is not known to the conductor.

A railway company are held, in Hanlon v. Central R. Co. of N. J. (N.Y.), 10 L. R. A. (N.S.) 411, to be responsible for the injury of a passenger due to the negligent performance, by their conductor, of a gratuitous act in assisting the passenger from the car to the station platform.

Carriers who accept an unattended invalid as a passenger, and attempt to render her assistance in boarding the train, are held, in Williams v. Louisville & N. R. Co. (Ala.), 10 L. R. A. (N.S.) 413, to be liable for injuries inflicted on her by their negligence in so doing.

Cheques and Drafts.—The drawee of a forged cheque who has paid the same without detecting the forgery, is held,

in First Nat. Bank v. Bank of Wyndmere (N.D.), 10 L. R. A. (N.S.) 49, to be entitled, upon discovery of the forgery, to recover the money paid from the party who received it, even though the latter was a good-faith holder, provided the latter has not been misled or prejudiced by the drawee's failure to detect the forgery.

The drawee of a forged draft is held, in Ford v. People's Bank (S. C.), 10 L. R. A. (N.S.) 63, to be entitled to recover back the amount paid upon it to one whose conduct has been such as to mislead him, or induce him to pay the draft without the usual security against fraud. With these cases is a note collating all the other authorities on the right of drawee of forged cheque or draft to recover money paid thereon.

Evidence.—Evidence of the good character of the wife is held, in Shipp v. Com. (Ky.), 10 L. R. A. (N.S.) 335, to be inadmissible in a prosecuting of her husband for murder of her alleged paramour, to shew that she was not guilty of conduct which accused assigned as a reason for his crime.

The right of a party to a judgment to impeach or set it aside in a collateral proceeding on the ground that it was obtained by perjured testimony, is denied in Bleakley v. Barclay (Kan.), 10 L. R. A. (N.S.) 230.

But, while false swearing, or perjury, alone, is not ground for setting aside or vacating a judgment, yet it is held, in Graves v. Graves (Iowa), 10 L. R. A. (N.S.) 216, that, if accompanied by any fraud extrinsic or collateral to the matter involved, sufficient to justify the conclusion that, but for such fraud, the result would have been different, a new trial may be granted.

Perjury as ground for relief against judgment is the subject of a note to these cases.

Master and Servant.—The owner of an automobile is held, in Lotz v. Hanlon (Pa.), 10 L. R. A. (N.S.), 202, not to be liable for injury to a pedestrian run down by it when

the chauffeur is, without the owner's knowledge, taking a party of his own friends on a pleasure drive; and it is held to be immaterial that the chauffeur intended, during the excursion, to procure some spark plugs for use on the machine.

Negligence.—The doctrine of "last clear chance" is held, in Drown v. Northern Ohio Traction Co. (Ohio), 10 L. R. A. (N.S.) 421, not to apply where the plaintiff has been negligent, and his negligence continues, and, concurrently with the negligence of defendant, directly contributes to produce the injury.

BOOK NOTICES.

A New Guide to the Bar: Containing the most recent Regulations and Examination Papers and a Critical Essay on the Present Condition of the Bar of England: by LL.B., Barrister-at-law: 3rd edition. London: Sweet and Maxwell Limited: 1907.

We understand that this work has had a considerable success. It is certainly written in an interesting way, and is eminently practical. "A General View of the English Bar," "How to become a Barrister," "The Inns of Court," and "Some Practical Points," the headings of the chapters, indicate the scope of the work. The appendices of Regulations, Examination Papers, etc., are valuable.

Cameron's Canada Supreme Court Rules: The Rules of the Supreme Court of Canada, Promulgated 19th June, 1907, with Notes, Forms, and Precedents: by Edward Robert Cameron, K.C., Registrar of the Court. Toronto: Arthur Poole & Co.: 1907. (Half-calf, $6.)

This book will be found useful to all who practise or expect to practise before the Supreme Court. The editor and the publisher have both acquitted themselves well.

PERIODICALS AND PAMPHLETS.

Harvard Law Review (December, 1907): — "Enforcement of a Right of Action Acquired under Foreign Law for Death upon the High Seas (II.)," by Philip Wardner; "The Next Step in the Evolution of the Case-Book," by Albert Marten Kales, with Note, by Eugene Wambaugh; "The Relation of Judicial Decisions to the Law," by Alexander Lincoln.

Columbia Law Review (November, December, 1907):— "A Century of 'Judge-Made' Law," by William B. Hornblower; "Error of Law," by Corry Montague Stadden; "The Function of the Judiciary (II.)," by Percy Bordwell; "The Courts and the People," by John Woodward; "Methods Followed in Germany by the Historical School of Law," by Rudolf Leonard; "The Present Status of the Northern Securities Decision," by David Walter Brown; "Powers of Sale as Affecting Restraints on Alienation," by Frederick Dwight.

Canadian Law Review (November, 1907): — "Henry Fielding as a Law Reformer," by Charles Morse, D.C.L.; "The International Congress of Law," by Louis J. Loranger, K.C., LL.D.; "County and Division Courts," by Lex; "Oganization of a Legal Business," by R. V. Harris.

Madras Law Journal (August, 1907):—"Title by Devolution of Possessory Rights."

Criminal Law Journal of India (Lahore, 15th October, 1907):—"Cross-Examination;" "Obscenity—What Constitutes an Indecent Publication."

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